Supreme Court, U.S.
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No.
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In The

Supreme Court of the United States

October Term, 1996

AMERICAN AIRLINES, INC.,

Petitioner,

v.

MAURICIO CRIALES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a dismissal for failure to comply with the statute of limitations contained in Title VII of the Civil Rights Act of 1964 is a dismissal "for lack of jurisdiction" within the "special meaning" of Fed. R. Civ. P. 41(b), and therefore not a *res judicata* bar to a second lawsuit raising the same claims.

STATEMENT REQUIRED BY RULE 29.6

American Airlines, Inc. is a wholly-owned subsidiary of AMR Corporation. American has no subsidiaries that are nonwholly owned.

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OPINIONS BELOW

Petitioner American Airlines, Inc. ("American") seeks review of a decision of the United States Court of Appeals for the Second Circuit which, with the dissenting opinion, is reported as *Criales v. American Airlines, Inc.*, 105 F.3d 93 (2d Cir. 1997), and is reproduced in the appendix to this petition (App. 1a-16a). The opinion of the district court is available on Westlaw, *Criales v. American Airlines, Inc.*, 95-CV-1709, 1995 WL 669900 (E.D.N.Y. Nov. 6, 1995) ("*Criales II*"), and is reproduced in the appendix (App. 17a-40a). The district court's decision dismissing respondent Mauricio Criales' first Title VII lawsuit on the ground of untimeliness is unreported ("*Criales I*"), and is also reproduced in the appendix (App. 41a-52a).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 21, 1997. American filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on February 4, 1997. That petition was denied in an Order dated and filed April 23, 1997, which is reproduced in the appendix (App. 53a-54a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

Section 706(e)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(e)(1), and Rule 41(b) of the Federal Rules of Civil Procedure are pertinent to this case.

Section 706(e)(1) of Title VII provides as follows:

§ 2000e-5. Enforcement provisions

* * *

(e) Time for filing charges; time for

> **service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system**
>
> (1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000e-5(e)(1).

Rule 41(b) of the Federal Rules of Civil Procedure provides as follows:

> **Rule 41. Dismissal of Actions**
>
> * * *
>
> **(b) Involuntary Dismissal: Effect Thereof:** For failure of the plaintiff to prosecute or to comply with these rules or

> any other order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Fed. R. Civ. P. 41(b).

STATEMENT OF THE CASE

This case presents the recurring question of whether a statute of limitations dismissal of a Title VII suit "operates as an adjudication upon the merits" for purposes of Fed. R. Civ. P. 41(b) and *res judicata*. Relying on this Court's pre-Title VII decision in *Costello v. United States*, 365 U.S. 265 (1961), the Second Circuit majority ruled that the district court's dismissal of *Criales I* on statute of limitations grounds was not an adjudication upon the merits, but rather was a dismissal for "lack of jurisdiction" within the "special meaning" of Rule 41(b) (App. 10a-11a). While the Fourth Circuit has embraced a similar rationale, the Second Circuit's resolution of this question conflicts with the decisions of the First, Fifth, Sixth and Eighth Circuits, as well as the purposes and policies of the doctrine of *res judicata*. The Second Circuit's decision, as well as *Costello*, also cannot be reconciled with other decisions of this Court, including *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but [is] like a statute of limitations"); *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1457 (1995) ("[t]he rules of finality, both

statutory and judge-made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim . . . as a judgment on the merits"); and *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 399 n.3 (1981) ("the *res judicata* consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong"; a Rule 12(b)(6) dismissal is a " 'judgment on the merits' ").

On December 20, 1991, American fired Criales, a former union-represented airline mechanic, for submitting a false expense report. The termination was sustained in arbitration by a three-member Railway Labor Act Board of Adjustment (App. 3a). After his discharge, Criales filed two national origin discrimination charges against American concerning his termination: (1) a February 5, 1992 EEOC charge (No. 160-92-1069), which was transferred for processing to the New York State Division of Human Rights ("NYSDHR"); and (2) a December 3, 1992 charge with the New York City Commission on Human Rights, which was transferred for processing to the EEOC (No. 160-93-0816). While Criales' February 1992 charge was pending, the EEOC dismissed the December 1992 charge as untimely, and on October 26, 1993 issued Criales his statutory right-to-sue notice relating to the December 1992 charge (App. 3a-4a).

In November 1993, based on the right-to-sue notice relating to his untimely December 1992 charge, Criales filed a *pro se* complaint in the district court (*Criales I*), alleging Title VII violations (App. 4a).[1] Criales thereafter retained counsel, who

1. At the time *Criales I* was filed, Criales' February 1992 EEOC charge was still pending before the NYSDHR (App. 4a). However, on August 29, 1994, *before* the district court dismissed *Criales I*, the NYSDHR notified Criales and American by letter than it had dismissed the February 1992 charge, explaining that Criales' discrimination claims were being litigated in federal court (App. 4a-5a).

filed an amended complaint alleging national origin discrimination under Title VII and 42 U.S.C. § 1981 (*Id.*). The amended complaint also sought to set aside the arbitration board's decision, and asserted state law claims of defamation and intentional infliction of emotional distress (App. 50a-52a).

On November 14, 1994, the district court granted American's motion to dismiss in *Criales I* under Fed. R. Civ. P. 12(b)(6). The court dismissed Criales' Title VII claims on the ground his EEOC discrimination charge was untimely filed (App. 4a; 46a-48a). The district court also dismissed on their merits Criales' § 1981 claims and his claim to set aside the arbitration decision, and dismissed the state law claims for lack of jurisdiction (App. 48a-52a). On December 1, 1994, Criales filed a *pro se* notice of appeal with the Second Circuit (App. 4a). On August 3, 1995, on the advice of counsel, Criales filed a motion to withdraw his appeal in *Criales I* "with prejudice" (App. 5a & n.1). The court of appeals granted Criales' motion on August 8, 1995 (App. 5a).

In the meantime, on January 31, 1995, the EEOC issued Criales a Notice of Right to Sue with respect to his timely-filed February 1992 EEOC charge (*Id.*). On April 28, 1995, Criales (through counsel) filed the complaint in *Criales II* alleging race discrimination under Title VII and § 1981, and state law claims for defamation and intentional infliction of emotional distress (*Id.*). On July 10, 1995, while Criales' appeal in *Criales I* was pending, American filed its Fed. R. Civ. P. 12(b)(6) motion to dismiss *Criales II*, contending that the decision in *Criales I* barred the discrimination claims raised in *Criales II* under well-settled *res judicata* principles (App. 5a; 23a).

On November 6, 1995, the district court granted American's motion, dismissing Criales' Title VII and § 1981 race discrimination claims as barred by the doctrine of *res judicata*

(App. 5a-6a; 23a-34a). Rejecting Criales' contention that the dismissal in *Criales I* could be likened to a dismissal for "lack of jurisdiction" under Fed. R. Civ. P. 41(b), the district court held, in reliance on *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 388 (1982), and other authority, that "the dismissal of *Criales I* was predicated on a lack of statutory prerequisite, not a 'lack of jurisdiction' " (App. 29a). The district court also exercised its discretion not to retain jurisdiction over the supplemental state law claims (App. 39a).

Criales appealed once again, and on January 21, 1997, the Second Circuit vacated that portion of the district court's decision dismissing Criales' Title VII claims on *res judicata* grounds (App. 13a, 14a).[2] The majority reached that conclusion despite acknowledging that "the district court's dismissal of Criales's complaint arising from his untimely charge was styled as a dismissal for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and that dismissals under Rule 12(b)(6) are generally considered judgments on the merits, unless the court specifies otherwise" (App. 11a) (citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981)).

Although it cited *Zipes* for a different proposition (*see* App. 12a), the court of appeals relied on the pre-Title VII decision of *Costello v. United States*, 365 U.S. 265 (1961),[3] stating that "[a]lthough the district court viewed the problem [in *Criales I*]

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2. The court of appeals also vacated that portion of the district court decision dismissing Criales' state law claims for lack of jurisdiction, but affirmed the dismissal of Criales' remaining federal claims (App. 14a).

3. In *Costello*, a case brought by the United States to revoke an order admitting the defendant to citizenship, the Court held that when a dismissal occurs because a party has failed to satisfy certain prerequisites to suit, it should be treated as one for lack of jurisdiction. 365 U.S. at 285-88.

as one of untimeliness, it is more appropriately seen as one of prematurity" (App. 6a). The court of appeals reasoned:

> Because [Criales] remained capable of complying with [a precondition requisite] by instituting his [second] suit after receipt of the right-to-sue notice on the timely charge, the dismissal of the first complaint should not have been found to operate as an adjudication upon the merits and as a bar to the subsequent complaint filed after the precondition had been satisfied. It was a dismissal "for lack of jurisdiction" within the *special meaning* of that term in Rule 41(b), as explained in *Costello*.

(App. 11a) (emphasis added). The court of appeals went on to state that "*Costello* makes clear that a dismissal in these circumstances (for failure to comply with a statutory prerequisite to suit) operates as a dismissal for 'lack of jurisdiction' " (App. 13a, n.3). The majority also believed that *res judicata* was not applicable because American "had not been 'put to the necessity of preparing a defense' " (App. 10a) (quoting *Costello*, 365 U.S. at 287), and emphasized the harshness of the district court's "drastic ruling" (App. 12a) — " '[i]n properly seeking to deny a litigant two 'days in court,' courts must be careful not to deprive him of one' " (App. 13a) (citation omitted).

In dissent, Judge Miner explained that, by basing its decision upon *Costello*, the majority disregarded this Court's holdings in *Moitie* and *Zipes* (App. 14a-15a).[4] Judge Miner was

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4. Judge Miner also dissented from the majority's ruling to reinstate Criales' state law claims, but concurred in the decision to affirm the dismissal of Criales' remaining federal law claims (App. 14a, 16a).

particularly troubled by the majority's reliance upon *Costello* in light of this Court's subsequent decision in *Zipes*:

> [w]hatever may have been the rule in *Costello*, it cannot be applied in a Title VII action involving untimely filing with the EEOC. It is because the "statutory requirement is analogous to a statute of limitations," . . . that dismissal for failure to comply with the requirement is a judgment on the merits . . .

(App. 15a-16a) (citations omitted).

Judge Miner explained that "[a]lthough the result envisioned by the foregoing is most unfortunate, it could have been avoided" (App. 16a). Criales could have pursued two options in order to avoid dismissal on the ground of *res judicata*: (1) Criales could have moved for a stay of *Criales I* pending receipt of a right-to-sue notice relating to his timely-filed February 1992 EEOC charge; or (2) Criales could have requested the district court to dismiss *Criales I* "without prejudice to renewal upon receipt of the timely right-to-sue letter" (*Id.*). Judge Miner concluded that Criales' "failure to have considered these alternatives leaves [him] in his present bind" (*Id.*).

REASONS FOR GRANTING THE WRIT

This case presents the fundamental question whether a dismissal for failure to file a timely Title VII charge with the EEOC "operates as an adjudication upon the merits" for purposes of Fed. R. Civ. P. 41(b) and *res judicata*. The Second Circuit's decision is contrary to decisions by this Court foreclosing "*ad hoc* determinations" of the finality of judgments. It is also contrary to this Court's holdings that filing a timely charge of discrimination with the EEOC is *not* a jurisdictional prerequisite

to filing a Title VII action in federal court, but rather is similar to a statute of limitations, and that a statute of limitations dismissal is a judgment on the merits. In addition, the Second Circuit's conclusion that the district court's dismissal of Criales' first Title VII suit on the ground of untimeliness was not an adjudication upon the merits under Rule 41(b) conflicts with decisions of the First, Fifth, Sixth and Eighth Circuits, as well as the overriding policies and purposes of the doctrine of *res judicata*.[5] As still other circuits have recognized, the continued vitality and scope of the "special meaning" (App. 11a) exception of *Costello v. United States*, 365 U.S. 265 (1961), to Rule 41(b) jurisdiction questions is an unresolved source of continuing confusion even outside the arena of discrimination law.[6]

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5. The only court of appeals that has decided the issue presented and not rejected the Second Circuit's approach is the Fourth Circuit. *See Stebbins v. Nationwide Mut. Ins. Co.*, 528 F.2d 934, 936 (4th Cir. 1975), *cert. denied*, 424 U.S. 946 (1976).

6. *See Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1180-81 & n.1 (4th Cir. 1989) (distinguishing *Costello* from cases presenting statute of limitations issues and finding that *ad hoc* determinations of equities are inconsistent with *Moitie* and *res judicata* principles); *id.* at 1184-85 (Murnaghan, J., dissenting) (arguing that *Costello* allows courts to decline to give *res judicata* effect in certain statute of limitations cases involving "unusual" or "extraordinary circumstances"); *Marin v. HEW, Health Care Financing*, 769 F.2d 590, 593 (9th Cir. 1985) (*Costello* gives a "broad reading to the jurisdictional exception set forth in Rule 41(b) . . ."), *cert. denied*, 474 U.S. 1061 (1986); *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983) (Scalia, J.) (suggesting that *Costello* has continuing vitality if jurisdictional defects "could be remedied by *occurrences subsequent to the original dismissal*") (emphasis original); *see also* J. Eichhorst, *Res Judicata Effects of Involuntary Dismissals: When Involuntary Dismissals Based Upon Prematurity Or Failure To Satisfy A Precondition To Suit Should Bar A Second Action*, 70 Cornell L. Rev. 667, 670-85 (1985) (collecting cases that do and do not apply *Costello's* "new jurisdictional exception" to actions involving dismissals for failure to satisfy preconditions to suit, and recognizing that courts that decline to apply *Costello* "have ameliorated the unfairness to the defendant and harm to judicial economy that can result from strict application of the *Costello* 'jurisdictional' test").

This Court has never ruled on the question presented in this case, and prompt resolution of the conflict in the courts of appeals is a matter of critical importance for Title VII jurisprudence and the finality of judgments in general. Until reversed or set aside, the Second Circuit's decision will encourage multiple litigation under Title VII, other federal and state anti-discrimination statutes and common law tort or contract theories. And, until the Court determines whether *Costello* is still good law or clarifies its application to Title VII cases, the unresolved scope of Rule 41(b)'s exception for jurisdictionally-based dismissals will impair principled application of *res judicata* in succeeding litigations under discrimination and other statutes that impose "preconditions" to suit.

I.

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT, AND DEMONSTRATES THAT THERE IS AN APPARENT CONFLICT BETWEEN *COSTELLO* AND AT LEAST TWO OTHER DECISIONS OF THIS COURT.

In ruling that the dismissal of the untimely Title VII claim in *Criales I* was not an adjudication on the merits because Criales had merely failed to satisfy a "precondition" to suit within the meaning of *Costello*, the Second Circuit disregarded explicit holdings of this Court. Because the Second Circuit's decision is based upon an *ad hoc* determination of fairness to a particular plaintiff (App. 11a-13a), and not the rigid application of *res judicata*, it contravenes this Court's repeated admonitions that a rigorous application of *res judicata* principles must not give way to a court's "*ad hoc* determination of the equities in a particular case." *E.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981); *Hart Steel Co. v. Railroad Supply*

Co., 244 U.S. 294, 299 (1917); *Jeter v. Hewitt*, 63 U.S. 352, 364 (1859). "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principles of *res judicata*.' " *Moitie*, 452 U.S. at 401 (*quoting Heiser v. Woodruff*, 327 U.S. 726, 733 (1946)). This approach promotes the evenhanded administration of justice and judicial economy, and "serves vital public interests." *Moitie*, 452 U.S. at 401; *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

The Second Circuit's application of *Costello* to Title VII timeliness "preconditions" — to draw *Criales I* into Rule 41(b)'s "lack of jurisdiction" exception — also cannot be reconciled with this Court's decision in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). *Zipes* makes plain that "filing a timely charge of discrimination with the EEOC is *not* a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Id.* at 393 (emphasis added). Indeed, "the structure of Title VII" and "the congressional policy underlying it" demonstrate that the timely filing requirements cannot be considered "jurisdictional" for any purpose:

> The provision granting district courts jurisdiction under Title VII, 42 U.S.C. § 2000e-5(e) and (f), does *not* limit jurisdiction to those cases in which there has been a timely filing with the EEOC. It contains no reference to the timely filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.

Id. at 393-94 (footnotes omitted; emphasis added).

The Second Circuit's decision therefore creates an unworkable anomaly whereby courts must deem Title VII's charge-filing "preconditions" to be statutes of limitations under *Zipes*, but are authorized to treat the same preconditions as jurisdictional requirements under Rule 41(b) and *Costello*'s "special meaning" when they seek to work equity and avoid "drastic" rulings (*see* App. 11a, 12a).[7] The Second Circuit's approach not only creates an unacceptable conflict between Title VII's timeliness requirements and the purportedly differing requirements of Rule 41(b), but it also contravenes this Court's admonition in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984), that the "[p]rocedural requirements established by Congress for gaining access to the federal courts [under Title VII] are not to be disregarded by courts out of a vague sympathy for particular litigants."

In addition to its incompatibility with Title VII principles, the Second Circuit's approach violates this Court's express directives that a statute of limitations dismissal is an adjudication upon the merits for purposes of Rule 41(b) and the doctrine of *res judicata*. "The rules of finality, both statutory and judge-made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: *as a judgment on the merits*." *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1457 (1995) (*citing* Rule 41(b); emphasis added); *United States v. Oppenheimer*, 242 U.S. 85, 87-88 (1916)

7. Commentators have also criticized *Costello*'s interpretation of the "lack of jurisdiction" exception in Rule 41(b). 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4435 at 337 (1981). Professors Wright, Miller and Cooper opine that *Costello*'s "method of interpreting Rule 41(b) is directly objectionable because it involves so slippery a method of manipulating the concept of jurisdiction." *Id.* at 335. They conclude that *Costello*'s interpretation of the term "jurisdiction" is both distorted and ambiguous, "demonstrat[ing] the capacity of the *Costello* opinion to confuse proper analysis." *Id.* at 337.

("A plea of the statute of limitations is a plea to the merits, . . . and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution"); *see also Moitie*, 452 U.S. at 399 n.3 (a Rule 12(b)(6) dismissal, as here (App. 11a), operates as a " 'judgment on the merits' " for purposes of *res judicata*).[8]

II.

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE PERTINENT DECISIONS OF OTHER COURTS OF APPEALS.

In view of this Court's holdings, the courts of appeals for the First, Fifth, Sixth and Eighth Circuits have all reached a conclusion opposite to that of the Second Circuit, holding that a dismissal for failure to comply with Title VII's or the Age Discrimination In Employment Act's ("ADEA's") timely-filing "preconditions" to suit operates as an adjudication upon the merits under Rule 41(b). *See Mills v. Des Arc Convalescent Home*, 872 F.2d 823, 826 (8th Cir. 1989) ("a disposition of a Title VII action as untimely filed is a decision on the merits for purposes of res judicata"); *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 562 (5th Cir. 1983) (*en banc*) (same), *rev'g*, 674 F.2d 379 (5th Cir. 1982); *see also Kale v. Combined Ins. Co. of Am.*, 924 F.2d 1161, 1164 (1st Cir.) ("It is beyond peradventure that the dismissal of a claim [under the ADEA] as time-barred constitutes a judgment on the merits, entitled to preclusive effect"), *cert. denied*, 502 U.S. 816 (1991); *Cemer v.*

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8. The Second Circuit's recognition of a "new facts" exception to the application of *res judicata* (App. 12a), also undermines the *Moitie* rule that a Rule 12(b)(6) dismissal is a judgment on the merits for purposes of *res judicata*. Indeed, "[i]f simply submitting new evidence rendered a prior decision factually distinct, *res judicata* would cease to exist." *Torres v. Shalala*, 48 F.3d 887, 894 (5th Cir. 1995).

Marathon Oil Co., 583 F.2d 830, 831-32 (6th Cir. 1978) (concluding that the dismissal of an untimely ADEA action was an adjudication on the merits for purposes of Rule 41(b)). The Fourth Circuit is the only court of appeals to consider the issue that has not rejected the Second Circuit's approach. *See supra* note 5.[9]

The Fifth Circuit's *en banc* decision in *Nilsen v. City of Moss Point, Mississippi*, 701 F.2d 556 (5th Cir. 1983), *rev'g*, 674 F.2d 379 (5th Cir. 1982), underscores both the conflict the Second Circuit's decision has created and the error of its rationale.[10] The *en banc* Fifth Circuit, relying upon *Zipes*, held that "the timely filing requirements of Title VII are to be treated as limitations periods *for all purposes*," including application of the doctrine of *res judicata*. *Id.* at 562 (emphasis added). The Fifth Circuit explained:

> Based on *Zipes*, we hold that the timely filing requirements of Title VII are to be treated as limitations periods *for all purposes*. *Zipes* clearly holds that these requirements are not jurisdictional, so that in any event it is beyond our power to declare

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9. Notably, numerous courts, including the Second and Fourth Circuits, have held that the *Costello* analysis does not apply in determining the *res judicata* effect of a prior statute of limitations dismissal outside of the Title VII or discrimination law context. *E.g.*, *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1180-81 (4th Cir. 1989) (collecting cases); *PRC Harris, Inc. v. Boeing* Co., 700 F.2d 894, 896-97 n.2 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983).

10. *See also Miller v. United States Postal Serv.*, 825 F.2d 62, 63-64 (5th Cir. 1987) (relying on *Nilsen*, court concluded that plaintiff's claim under the Rehabilitation Act of 1973 was barred by *res judicata*, where, like the present case (App. 3a-5a), that claim was pending before the administrative agency at the time his original Title VII action was dismissed as untimely).

> them to be so. This leaves us only the choice between viewing them as either limitations periods or as provisions *sui generis* — subject to waiver and to equitable tolling, but nevertheless not merits adjudications for purposes of the preclusion doctrines. We see no reason to reach the second — as it seems to us — bizarre result, especially in view of *Zipes'* entire failure to envision it and its repeated analogizing of these provisions to "limitations periods."[11]

Id. (emphasis added). The Fifth Circuit is right, and the Second Circuit is wrong. As set forth above, at least three other circuits have agreed with the Fifth Circuit and disagreed with the Second Circuit. *See supra* pages 13-14.

As the Fifth Circuit in *Nilsen* also recognized, this Court's "repeated analogizing" of Title VII's timely-filing requirements to "limitations periods" in *Zipes* and its progeny makes clear that this Court never envisioned that a court would use *Costello*'s broad interpretation of the term "jurisdiction" under Rule 41(b) to nullify settled *res judicata* principles in the context of an untimely Title VII claim. 701 F.2d at 562. Yet, by relying on *Costello* to attribute "special meaning" (App. 11a) to the term "jurisdiction" under Rule 41(b), that is precisely what the Second

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11. Prior to the *en banc* decision, a panel of the Fifth Circuit had all but decided that *Zipes*, and not *Costello*, governs the question whether the dismissal of an untimely Title VII suit is an adjudication on the merits (as opposed to a dismissal "for lack of subject matter jurisdiction") for purposes of *res judicata*. 674 F.2d at 382-83 & nn.3, 5. As the *en banc* Fifth Circuit recognized, the panel "veer[ed] away [from making that determination] only at the last minute because it concluded that a resolution of it was not necessary to its decision." 701 F.2d at 562. The *en banc* Fifth Circuit resolved that issue by relying upon *Zipes*, and not *Costello*. *Id.*

Circuit has done in this case, and courts will do so in the future if they follow the Second Circuit's, rather than the Fifth Circuit's, lead on this issue.

Thus, although the conflict in rationales is most vividly spelled out in the *en banc* decision of the Fifth Circuit in *Nilsen*, 701 F.2d at 562, it is clear that this case would have been decided differently in at least four of the federal courts of appeals, all of which have recognized that a dismissal for failure to file a timely Title VII or ADEA claim operates as an adjudication on the merits for purposes of *res judicata*. *See supra* pages 13-14.

III.

PROMPT RESOLUTION OF THIS CONFLICT IS A MATTER OF GREAT NATIONAL IMPORTANCE.

Not only is there a fundamental conflict on the question presented, but prompt resolution of this conflict is a matter of national importance with profound, immediate implications. The Second Circuit's decision completely vitiates the policies and purposes underlying the doctrine of *res judicata*, thereby permitting parties to relitigate matters that easily could have been raised in a prior lawsuit and creating havoc in future employment discrimination cases. It will encourage piecemeal litigation, distort statutory requirements in favor of individual notions of equity and disrupt settled expectations based upon the holdings of *Zipes, Plaut* and *Moitie*.

In contrast, the approach embraced in Title VII and ADEA cases by the First, Fifth, Sixth and Eighth Circuits recognizes the salutary principle of *res judicata*. Most notably, the approach embraced by these circuits does not deprive a plaintiff of his or her day in court; rather, those circuits simply require, consistent with this Court's teachings, that a plaintiff bring all claims based

on the same underlying facts in one action. Such an approach recognizes the need for finality and avoidance of inconsistent results — the cornerstone principles of *res judicata*. This rigid application of *res judicata* produces sensible results which should not be disregarded lightly.

Moreover, in seeking to avoid an allegedly "drastic" result (App. 12a), the Second Circuit's result-oriented approach disregards that, during the pendency of *Criales I*, Criales easily could have raised his Title VII claims based upon his timely-filed February 1992 EEOC charge — but he and his counsel made a tactical decision not to do so. As Judge Miner recognized in his dissenting opinion, during the pendency of *Criales I*, Criales had several options for preserving his Title VII claim relating to his timely EEOC charge: (1) he "could have moved to stay [*Criales I*] pending receipt of a right-to-sue letter that resulted from the timely filing of his first [February 1992] administrative charge"; or (2) he "could have requested the district court to dismiss the prior action without prejudice to renewal upon receipt of the timely right-to-sue letter" (App. 16a). The majority failed to acknowledge that, after 180 days, "issuance of [EEOC] suit letters is a purely ministerial task involving the exercise of no official discretion." *Stebbins*, 528 F.2d at 937 n.5. Indeed, this Court has recognized that "a complainant . . . may elect to circumvent the EEOC procedures and seek relief through a private enforcement action in a district court" after 180 days. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 361 (1977); *see also Stebbins*, 528 F.2d at 937 n.5 ("Such [right-to-sue] letters are issued upon request after expiration of the statutorily prescribed waiting period").[12]

12. Contrary to the majority's opinion, the procedural history in this case is not "unusual" (App. 2a) or "complex" (App. 3a). Numerous cases demonstrate that employment discrimination plaintiffs often file more than one EEOC charge, and often file federal court actions at the same time they (Cont'd)

Further, Criales could have filed a motion under Fed. R. Civ. P. 60 to vacate or modify the judgment in *Criales I*, or he could have pursued his direct appeal in *Criales I* (which he voluntarily withdrew with prejudice).

In addition to the overriding interest of ensuring the finality of judgments, the corresponding interest in promoting judicial economy is equally vital. Indeed, the overburdened dockets of today's federal courts require that court access be denied to those who have had an opportunity to litigate their claims in a prior action. *See, e.g., Moitie*, 452 U.S. at 401 (recognizing that the policies favoring *res judicata* are "even more compelling in view of today's crowded dockets"). "It would undermine the basic policies protected by the doctrine of *res judicata* to permit [a party] to once again avail [himself] of judicial time and energy while another litigant, who has yet to be heard even once, waits in line behind [him]." *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 596 (7th Cir. 1986). In short, allowing Criales to maintain a second Title VII action following the Rule 12(b)(6) dismissal of his first, untimely Title VII lawsuit interferes with the quest for efficient docket management and strips the original decision of its legal significance.

(Cont'd)
have a charge pending before the EEOC. *E.g., Weiss v. Coca Cola Bottling Co. of Chicago*, 990 F.2d 333, 335 & n.1 (7th Cir. 1993); *Prochotsky v. Baker & McKenzie*, 966 F.2d 333, 334-35 (7th Cir. 1992); *Miller v. United States Postal Serv.*, 825 F.2d 62, 63-64 (5th Cir. 1987); *Bailey v. USX Corp.*, 658 F. Supp. 279, 281-82 (N.D. Ala. 1987), *aff'd*, 850 F.2d 1506 (11th Cir. 1988). Yet *res judicata* is no less applicable to Title VII claims simply because Congress saw fit to require that a plaintiff exhaust his administrative remedies before commencing a federal court action. *Prochotsky*, 966 F.2d at 334-35 (concluding that plaintiff's Title VII claim was barred by *res judicata*, where her Title VII charge was pending at the EEOC at the time her original ERISA action had been dismissed).

Moreover, unless the Second Circuit's decision is overturned, courts will have separate rules for determining the preclusive effect under Rule 41(b) of limitations dismissals in Title VII actions and limitations dismissals in all other civil actions. *Compare Criales II* (App. 6a-14a) (dismissal of an untimely Title VII action is not an adjudication upon the merits), and *Stebbins*, 528 F.2d at 936 (same), *with Plaut*, 115 S. Ct. at 1457 (statute of limitations dismissal of federal securities law claims operates as an adjudication upon the merits under Rule 41(b)), *Shoup*, 872 F.2d at 1181 (dismissal of an untimely personal injury suit is an adjudication upon the merits), and *PRC Harris*, 700 F.2d at 896-97 & n.2 (dismissal of an untimely breach of contract action is an adjudication upon the merits). Clearly this Court never envisioned that the pre-Title VII decision in *Costello* could be applied to modify the *Zipes* holding to produce such an unworkable result.

Most significantly, this Court can end this potential confusion and disruption without burdening its docket. Because the majority opinion of the Second Circuit so thoroughly misapprehends settled principles of *res judicata* and disregards this Court's precedent, it would be entirely appropriate for the Court summarily to vacate the decision of the Second Circuit and remand with directions to dismiss the complaint.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari, summarily vacate the Second Circuit's decision, and remand with directions that the complaint be dismissed on the ground of *res judicata*. Alternatively, the Court should grant the petition and give the case plenary consideration.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JANUARY 21, 1997 (105 F.3d 93)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1390—August Term, 1995

(Argued: April 19, 1996 Decided: January 21, 1997)

Docket No. 95-9170

MAURICIO CRIALES,

Plaintiff-Appellant,

—v.—

AMERICAN AIRLINES, INC.,

Defendant-Appellee.

Before:

MINER, MCLAUGHLIN, and LEVAL,

Circuit Judges.

Pro se plaintiff appeals from a judgment of the United States District Court for the Eastern District of New York (Glasser, *J.*) dismissing his discrimination complaint primarily on res judicata grounds.

Appendix A

Affirmed in part, vacated in part and remanded.

Judge Miner concurs in part and dissents in part by separate opinion.

MAURICIO CRIALES, Pro Se, Woodside, N.Y., *for Plaintiff-Appellant.*

EDWARD CERASIA II, New York, N.Y., (Seyfarth, Shaw, Fairweather & Geraldson, New York, N.Y., Of Counsel), *for Defendant-Appellee.*

LEVAL, *Circuit Judge*:

Mauricio Criales, appearing *pro se*, appeals from a judgment of the United States District Court for the Eastern District of New York (I. Leo Glasser, *Senior Judge*), dismissing his complaint. The complaint alleges in part that Criales's employer American Airlines, Inc. ("AA"), discriminated against him by reason of his Hispanic origin in violation of 42 U.S.C. § 2000e *et seq.* (codifying Title VII of the Civil Rights Act of 1964). The district court dismissed the complaint for a number of reasons including that the Title VII claims were barred by res judicata because of the previous dismissal of similar claims. In the unusual circumstances of this case, we conclude that the Title VII claims were not barred by res judicata.

We therefore reverse that portion of the judgment which dismissed Criales's Title VII claims on res judicata grounds.

Appendix A

I. Background

This case has a rather complex procedural history, which we explain here in some detail because it is crucial to our decision.

Criales is an American citizen who was born in the Republic of Colombia and is Hispanic. In November 1990, he was hired by AA to work as an airline mechanic at John F. Kennedy International Airport. The complaint alleges that his co-workers harassed and ridiculed him because of his Latino origin, and that AA officials condoned this harassment.

On December 7, 1991, AA suspended Criales while it investigated an allegation that he had filed a false expense report relating to his attendance at a training course in Chicago. Criales maintains that, at the hearing on his alleged misconduct, he tried unsuccessfully to assert his allegations of discriminatory harassment. Criales was terminated on December 20, 1991. On March 12, 1992, he and his union contested the termination before an arbitration panel, which upheld the dismissal.

Without the aid of counsel, Criales filed two administrative charges against AA alleging discrimination because of his national origin. The first charge, dated February 5, 1992, was filed with the Equal Employment Opportunity Commission ("EEOC") within the time allowed by Title VII. The EEOC transferred this charge for processing to the New York State Division of Human Rights ("NYSDHR"). After a number of months with no response, Criales filed a second similar charge, dated December 3, 1992, this time with the New York City Commission on Human Rights ("NYCCHR"); it was transferred for processing to the EEOC. The second

charge was not filed within the time allowed by Title VII. These two charges each alleged discrimination on the basis of national origin, and were based substantially on the same allegedly discriminatory conduct. *Compare* Brief of Appellant, Exhibit B, *with id.*, Exhibit C. The EEOC dismissed the December 1992 charge because it was not timely filed, and issued a right-to-sue notice in connection with that charge on October 26, 1993.

On November 18, 1993, after receiving the right-to-sue notice based on the untimely December 1992 charge (but before receiving a right-to-sue notice on his timely charge), Criales filed a *pro se* complaint in the district court. Criales then retained counsel and amended his complaint in several respects, adding claims under 42 U.S.C. § 1981, and pendent state law claims of defamation and intentional infliction of emotional distress. AA moved to dismiss the complaint for failure to state a claim. The district court granted the motion, ruling that Criales's Title VII claims must be dismissed because the underlying administrative charge (the one filed in December 1992) was not timely filed. *Criales v. American Airlines, Inc.*, 93 Civ. 5340 (E.D.N.Y. Nov. 17, 1994) ("*Criales I*"). The other claims were dismissed for various reasons that are not of significance to this opinion. On December 1, 1994, Criales, no longer represented by counsel, filed a *pro se* notice of appeal with this court.

Meanwhile, his first charge was making its way through the administrative process. As noted above, this timely charge had been referred by the EEOC for initial processing to the NYSDHR. On August 29, 1994, recognizing that Criales's complaint stemming from the second charge was being litigated in district court, the NYSDHR dismissed the timely charge for "administra-

tive convenience" on the rationale that the litigation of the second charge in the district court would resolve all the issues raised in the first charge. On January 31, 1995, while his appeal was pending, Criales received a right-to-sue notice on the timely charge.

Apparently seeking to inform this court that he could now proceed on the timely charge, Criales attempted to append his right-to-sue notice on the timely charge to his appellate brief. AA moved to strike the right-to-sue notice from Criales's brief on the grounds that it had not been in the record below. Criales then moved to withdraw his appeal without prejudice so that he could, as he put it in his motion papers, "seek judicial remedy in the Eastern District of New York on the basis of a newly issued, timely 'Right to Sue' letter by the EEOC." AA opposed the motion, and it was denied by this court on May 26, 1995, in an order stating that Criales would be permitted to withdraw his appeal with prejudice. On August 8, 1995, this court granted Criales's *pro se* motion to withdraw his appeal with prejudice.[1]

Criales (represented again by counsel) then filed a new complaint in the district court based on the new right-to-sue notice granted on the first, timely charge. AA moved to dismiss the complaint. The district court granted the motion, ruling that Criales's claims of discrimination under Title VII were barred by res judicata. *Criales v. American Airlines, Inc.*, 95 Civ. 1709, 1995 WL 669900 (E.D.N.Y. Nov. 6, 1995) ("*Criales II*"). The other federal claims were dismissed on various grounds, and the state claims were dismissed for lack of juris-

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[1] Although Criales filed this motion *pro se*, he indicated at oral argument that he did so after receiving informal advice from his former attorney.

diction, by reason of the absence of a valid federal claim to which they could be appended.

This appeal followed.

II. Discussion

The primary question raised by this appeal is as follows: Where a plaintiff filed two administrative charges alleging illegal discrimination under Title VII—one timely, the other untimely—and instituted suit upon the agency's delivery of a right-to-sue notice on the untimely charge, which suit was then dismissed by reason of the untimeliness of that charge, does that dismissal operate as an adjudication on the merits, barring the plaintiff from proceeding upon the timely charge? The district court believed it did. We disagree.

The prerequisites for a suit under Title VII include a timely filed administrative charge and timely institution of the suit after receipt of a right-to-sue notice. *See* 42 U.S.C. § 2000e-5(e)(1) (timely charge) & (f)(1) (right-to-sue notice); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, 94 S. Ct. 1011, 1019 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798, 93 S. Ct. 1817, 1822 (1973). Criales complied with both requirements. The only reason for the dismissal was that he had previously filed a suit, based on an untimely administrative charge, which suit was dismissed because of the untimeliness of the charge. Although the district court viewed the problem as one of untimeliness, it is more appropriately seen as one of prematurity. Had Criales waited to file his suit until receipt of the right-to-sue notice on the *timely* charge, there would have been no defect. The superfluous untimely administrative charge would have been irrelevant to Criales's right to proceed

on his timely charge. His problem was that he filed the initial complaint without waiting for the issuance of the right-to-sue notice based on his timely charge.

Like any other dismissal for failure to exhaust administrative remedies, a dismissal of a Title VII action by reason of a plaintiff's failure to wait for a right-to-sue notice is not a bar to instituting the suit after the notice is delivered. *See, e.g., Johnson v. Nyack Hosp.*, 86 F.3d 8, 10 (2d Cir. 1996) (noting district court's dismissal without prejudice for failure to exhaust administrative remedies); *see also Twitty v. Smith*, 614 F.2d 325, 335 n.16 (2d Cir. 1979) (dismissal for failure to exhaust state remedies is without prejudice). There is no reason why the result should be different here merely because plaintiff had filed a second administrative charge that was superfluous and untimely.

The district court believed the bar to suit was mandated by the terms of Rule 41(b) of the Federal Rules of Civil Procedure, which provides

> Unless the court in its order for dismissal otherwise specifies, . . . any dismissal . . . , other than a dismissal for lack of jurisdiction, [or for other specified reasons not here pertinent] operates as an adjudication on the merits.

The district court noted that courts have found the administrative time limits of Title VII to be subject to equitable tolling and estoppel and have thus considered them to be "not jurisdictional." *Criales II*, 1995 WL 669900, at *6. The court thus concluded that the dismissal for untimeliness of the charge was not within the "lack of jurisdiction" exception of Rule 41(b), and that it operated as an adjudication on the merits.

Appendix A

The teachings of the Supreme Court in *Costello v. United States*, 365 U.S. 265, 81 S. Ct. 534 (1961), require a different analysis and result. The Court there considered whether a district court's dismissal of a denaturalization action, because of the government's failure to file an affidavit of good cause, barred the government from filing a new complaint with the proper affidavit. The district court had not designated the dismissal as jurisdictional, nor had it stated whether the dismissal was with or without prejudice. 365 U.S. at 268, 81 S.Ct. at 536. The Court ruled that, despite the district court's silence on the question, the dismissal was jurisdictional within the meaning intended by Rule 41(b), and thus without prejudice. 365 U.S. at 285; 81 S. Ct. at 544. The Court noted that the term "lack of jurisdiction" as used in Rule 41(b) was a term of art, 365 U.S. at 287, 81 S. Ct. at 546, encompassing failure to comply with statutory prerequisites, 365 U.S. at 285, 81 S.Ct. at 545. Writing for the Court, Justice Brennan referred to the exception in Rule 41(b) for certain enumerated dismissals that are without prejudice, and explained:

> We regard the exception as encompassing those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim.

365 U.S. at 285, 81 S.Ct. at 545. The origins of this exception, according to Justice Brennan, were in the common law rule that "dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim." *Id.* Justice Brennan noted that this principle had been applied at common law in many cases involving motions to dismiss by a defendant, and

that Rule 41(b) did not alter this rule. He quoted *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866), accordingly: "If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." 365 U.S. at 286, 81 S.Ct. at 545.

Shortly thereafter, we interpreted *Costello* to mean that

> the preclusive effect afforded dismissals by Rule 41(b) was intended to apply only to those situations in which a defendant must incur the inconvenience of preparing to meet the merits of the plaintiff's claims because there is no initial bar to the court's reaching the merits as there would be, for illustrative purposes, if there were a defect in pleadings or parties.

Nasser v. Isthmian Lines, 331 F.2d 124, 127 (2d Cir. 1964); *see also Saylor v. Lindsley*, 391 F.2d 965, 967, 969 (2d Cir. 1968) (in light of *Costello*, dismissal of derivative suit for failure to post bond, despite being labeled "with prejudice," did not bar subsequent suit by another stockholder because defendants were not required to prepare defense and court did not reach merits of plaintiff's substantive claim); *Papilsky v. Berndt*, 466 F.2d 251, 256-57 (2d Cir.) (similar), *cert. denied*, 409 U.S. 1077, 93 S.Ct. 689 (1972); 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, Civil 2d § 2373, at 405 (1995) ("[C]ourts have recognized that Rule 41(b) does not apply in situations in which a case is dismissed because of some initial bar to reaching the merits of the plaintiff's claims . . . .");

18 Charles A. Wright et al., Federal Practice and Procedure, Jurisdiction § 4437, at 347 (1981) ("In ordinary circumstances a second action on the same claim is not precluded by dismissal of a first action for prematurity or failure to satisfy a precondition to suit.").

Like the government's failure to file an affidavit of good cause in *Costello*, Criales's filing of a complaint based on an untimely underlying administrative charge, where he also had filed a timely charge upon which he had not yet received his right-to-sue notice, "simply constituted non-fulfillment of a prerequisite to the initiation of the proceedings." *Weston Funding Corp. v. Lafayette Towers, Inc.*, 550 F.2d 710, 713 (2d Cir. 1977) (interpreting *Costello*). AA had not been "put to the necessity of preparing a defense." *Costello*, 365 U.S. at 287, 81 S. Ct. at 546. Plaintiff had not yet fulfilled a statutory prerequisite to suit, but remained capable of fulfilling it. His suit was premature.

The district court's initial characterization of the first dismissal as being due to Criales's failure to satisfy a "statutory prerequisite[ ]" was entirely correct. *Criales I*, slip op. at 7, 8. The court described the dismissal in similar terms when it dismissed the Title VII claims in Criales's second complaint on res judicata grounds, stating that the first dismissal had been "predicated on a lack of a statutory prerequisite . . . .' " *Criales II*, 1995 WL 669900, at *6. The court went on, however, to conclude that a dismissal predicated on lack of a statutory prerequisite was not based on a "lack of jurisdiction." *Id.*

In light of *Costello*, *Nasser*, and similar decisions, the district court was drawing a distinction where one should not have been drawn. Criales simply had failed to comply "with a precondition requisite to the Court's

going forward to determine the merits of his substantive claim." *Costello*, 365 U.S. at 285, 81 S. Ct. at 545. Because he remained capable of complying with that precondition by instituting his suit after receipt of the right-to-sue notice on the timely charge, the dismissal of the first complaint should not have been found to operate as an adjudication upon the merits and as a bar to the subsequent complaint filed after the precondition had been satisfied. It was a dismissal "for lack of jurisdiction" within the special meaning of that term in Rule 41(b), as explained in *Costello*. *See Truvillion v. King's Daughters Hosp.*, 614 F.2d 520, 524 (5th Cir. 1980) ("Because a dismissal for failure to meet a condition for filing suit does not operate as an adjudication upon the merits, it cannot bar a subsequent suit between the parties.") (internal quotations omitted).

We recognize that the district court's dismissal of Criales's complaint arising from his untimely charge was styled as a dismissal for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and that dismissals under Rule 12(b)(6) are generally considered judgments on the merits, unless the court specifies otherwise. *See Federated Dep't Stores, Inc., v. Moitie*, 452 U.S. 394, 399 n.3, 101 S.Ct. 2424, 2428 n.3 (1981).

Nonetheless, we would not permit the choice of labels to distort substance, especially where the consequence would be so drastic as to deprive a party of the opportunity to be heard. Regardless whether characterized as a failure to plead the necessary elements of his cause of action, or as failure to comply with all the statutory prerequisites, the reason for the first dismissal was that plaintiff had not waited until receipt of the right-to-sue notice on his timely administrative charge. To consider

it an adjudication on the merits of his discrimination complaint is a distortion.

Furthermore, some authorities hold that a Rule 12(b)(6) dismissal "will not bar a second action if new facts have come into existence or have been alleged for the first time and it was the absence of these facts that made the first complaint defective." 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, Civil 2d § 2373, at 408 (1995) (citing cases). Here, the pertinent new fact was that Criales's second complaint was based on the EEOC's delivery of a right-to-sue notice upon Criales's timely charge.

The district court also noted that Criales had procedural means at his disposal either to compel the issuance of a right-to-sue notice on his timely complaint prior to the dismissal of his first action, or to convince the court to stay, rather than dismiss, the first action while awaiting the issuance of the right-to-sue notice on the timely charge. These observations were all true but, in our view, irrelevant to whether the dismissal of the initial action should have been considered an adjudication on the merits.[2] If anything, by stressing the simple procedural devices by which Criales might have avoided the drastic ruling, the district court's observations underscore the inappropriateness of denying him the opportunity to have his claim adjudicated. *Cf. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397, 102 S. Ct. 1127, 1134 (1982) ("a technical reading [of Title VII] would be 'particularly inappropriate in a statutory scheme in

[2] No contrary inference may be drawn from this court's denial of Criales's motion to withdraw his first appeal without prejudice. The prejudice in question related to the appeal of the first action. There was no suggestion that Criales's voluntary dismissal of the appeal should bar him from proceeding to file suit upon his timely charge, which is what he had told this court he intended to do.

which laymen, unassisted by trained lawyers, initiate the process' ") (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527, 92 S. Ct. 616, 619 (1972)).

We noted in *Fay v. South Colonie Central School District*, 802 F.2d 21, 29 (2d Cir. 1986), that "[i]n properly seeking to deny a litigant two 'days in court', courts must be careful not to deprive him of one." (quotation marks and citation omitted). Because plaintiff never had a day in court on his Title VII claims, and because his initial suit was dismissed by reason of a curable defect—his failure to satisfy a statutory prerequisite—we reverse the part of the judgment which held that res judicata barred those claims.[3]

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[3] *Samuels v. Northern Telecom Inc.*, 942 F.2d 834 (2d Cir. 1991), does not require a different result. In that case, the plaintiff voluntarily dismissed his first action "with prejudice" and his stipulation to this effect was so ordered by the court. Under Rule 41(a) such a dismissal so ordered with prejudice acts as an adjudication on the merits.

In contrast, the dismissal of Criales's complaint did not arise under Rule 41(a); rather, it was an *involuntary* dismissal under Rule 41(b), imposed because of Criales's failure to wait for the right to sue letter on his first administrative complaint. By the terms of Rule 41(b), an involuntary dismissal is on the merits *unless it is a dismissal for lack of jurisdiction* (as well as other specified exclusions). As explained above, *Costello* makes clear that a dismissal in these circumstances (for failure to comply with a statutory prerequisite to suit) operates as a dismissal for "lack of jurisdiction." Unlike the dismissal in *Samuels*, such a dismissal was not on the merits. Indeed, the judge did not say the dismissal was with prejudice. After the involuntary dismissal of his first action by reason of his failure to comply with the statutory prerequisite, Criales was free to file his second complaint without preclusion.

The dismissal "with prejudice" of Criales's appeal in his first action did not convert the prior dismissal of that action from one for lack of jurisdiction to one on the merits. The judgment of the district court remained what it was—a dismissal for lack of jurisdiction without preclusive effect. It could not be changed by the taking or dropping of an appeal. Thus, when Criales voluntarily dismissed *his appeal* from the first action with prejudice, that terminated *the first action*. It did not transform the dismissal from one for lack of jurisdiction to one on the merits.

We find no error in the district court's dismissal of the remaining federal claims. As to the pendent state claims, however, the district court dismissed these for lack of subject matter jurisdiction because there was no federal claim to which they could be appended. Our direction that Title VII claims be reinstituted nullifies the rationale for that ruling. The dismissal of the state claims is therefore also vacated.

III. Conclusion

The portions of the judgment dismissing plaintiff's Title VII claims on grounds of res judicata and dismissing pendent state claims are vacated. The dismissal of the remaining federal claims is affirmed. The action is remanded for further proceedings.

MINER, *Circuit Judge*, concurring in part and dissenting in part:

Because I agree with the district court that Criales' Title VII claims are barred by *res judicata*, I respectfully dissent from so much of the majority opinion as vacates the judgment dismissing the Title VII claims and pendent state claims. I concur in the majority opinion to the extent that it dismisses the remaining federal claims.

The prior action brought by Criales was dismissed as to the Title VII claims for untimely filing of his second employment discrimination complaint with the EEOC. The majority opinion acknowledges that the dismissal of the Title VII portion of the complaint in that action was grounded in Criales' failure to state a Title VII claim,

Fed. R. Civ. P. 12(b)(6), and that such a dismissal generally is considered a judgment on the merits. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981).

My colleagues nevertheless see the dismissal of the prior action as being for lack of jurisdiction within the intendment of Fed. R. Civ. P. 41(b) and therefore without prejudice to the bringing of a new action based upon the earlier timely filing with the EEOC. This analysis is predicated in the main upon the decision of the Supreme Court in *Costello v. United States*, 365 U.S. 265 (1961). In that case, the Court held that dismissal for the government's failure to file a statutorily required affidavit of good cause in a denaturalization action was for lack of jurisdiction under 41(b) and therefore without prejudice. There, the district court had not classified the dismissal as without prejudice or for lack of jurisdiction.

Aside from the fact that the district court in the opinion giving rise to this appeal makes it clear that the dismissal of the previous action was not intended to have a jurisdictional basis, precedent compels us to arrive at the same result. The Supreme Court could not have been more clear on this subject:

> We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.

Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). Whatever may have been the rule in *Costello*, it cannot be applied in a Title VII action involving untimely filing with the EEOC. It is because the "statutory requirement is analogous to a statute of limitations,"

Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 712 (2d Cir. 1996), that dismissal for failure to comply with the requirement is a judgment on the merits. *See PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896-97 n.2 (2d Cir. 1983) (holding that a dismissal on statute of limitations grounds is an adjudication on the merits for purposes of *res judicata*).

Although the result envisioned by the foregoing is most unfortunate, it could have been avoided. Criales could have moved for a stay in the prior action in the district court pending receipt of the right-to-sue letter that resulted from the timely filing of his first administrative complaint. *See Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 41 (2d Cir. 1992). In the alternative, Criales could have requested the district court to dismiss the prior action without prejudice to renewal upon receipt of the timely right-to-sue letter. Although Criales has conducted the bulk of this litigation as a *pro se* litigant, he did appear by counsel at various stages of the first action. Whether the fault is that of counsel or Criales himself, the failure to have considered these alternatives leaves Criales in his present bind.

Because the district court properly dismissed Criales' federal claims, it did not abuse its discretion in declining to exercise jurisdiction over his state law claims. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). Criales may bring his state claims in state court if he chooses to do so.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED NOVEMBER 6, 1995 (1995 WL 669900)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-95-1709

MAURICIO CRIALES,

Plaintiff,

-against-

AMERICAN AIRLINES, INC.,

Defendant.

MEMORANDUM AND ORDER

GLASSER, United States District Judge:

SUMMARY

This is the second action brought in this court by plaintiff Mauricio Criales ("Criales") in response to his employment termination by defendant American Airlines, Inc. ("AA"). Criales charges racial discrimination claims under Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. §2000e *et seq.* ("Title VII") and 42 U.S.C. § 1981 ("§ 1981"), as amended by the Civil Rights Act of 1991; and pendent state law tort claims of intentional infliction of emotional distress, defamation, and slander.

AA moves in the alternative for a dismissal of the complaint

on the grounds of res judicata; for a dismissal of the complaint pursuant to Fed. R. Civ. Proc. 12(b)(1) or (6); or for summary judgment on the post-November 21, 1991 claims pursuant to Fed. R. Civ. Proc. 56 which would have the effect of dismissal. For the reasons below, AA's motion to dismiss is granted.

FACTS

For purposes of this motion to dismiss, the following facts are accepted as true. Plaintiff Mauricio Criales ("Criales"), is an American citizen, is Hispanic by descent, and was born in the Republic of Colombia. Complaint ¶ 2. Criales was hired by defendant American Airlines, Inc. ("AA") on or about November 10, 1990. Complaint ¶ 6.

Criales alleges that he experienced ridicule and harassment by various employees of AA during his employment because of his Hispanic or Latin ancestry. Complaint ¶¶ 7, 11, 12, 15-16, 19, 24, 29. Criales alleges that his supervisors at AA were aware of this harassment and condoned it. Complaint ¶¶ 13-14, 18, 27-28, 30, 36. For example, Criales alleges that a series of pranks involving AA's public address system caused him to perform badly and to lose his job. Complaint ¶¶ 25-26, 35, 42. In addition, Criales alleges that a disparate application of AA's regulations caused him to be fired wrongfully.

From September 20, 1991 to October 18, 1991, Criales and other AA employees were each allotted a $1,000 spending allowance for attending an avionics course in Chicago. Complaint ¶ 44-45. Criales filed a report seeking reimbursement of $729 for expenses incurred, including $120 in dry cleaning receipts incurred in Queens, New York. Complaint ¶ 46-47. Criales falsely reported that the $120 in dry cleaning had been

incurred at his hotel in Chicago, relying on statements by his co-workers that "everybody" submitted receipts for things they had not paid for and that AA "never even bothered to check expense reports." Complaint ¶ 48.

On December 7, 1991, AA placed Criales on suspension while investigating alleged expense accounts improprieties. Complaint ¶ 50. Criales states that at a mandatory pretermination AA hearing he was ignored with respect to his complaints of harassment. Complaint ¶ 68. On December 20, 1991, AA permanently terminated Criales' employment. Complaint ¶ 51.

On March 12, 1991, Criales and his union unsuccessfully contested his employment termination before a three-person arbitration panel of the American-Transport Workers Union New York Area Board of Adjustment. Complaint ¶ 62. Criales states that AA employees refused to supply him with documents he requested to prepare for the arbitration. Complaint ¶ 63-65. At the arbitration, Criales was not permitted to discuss discrimination and harassment he had experienced. Complaint ¶ 67.

The following facts are not based on statements made by Criales, but are based on documents submitted by AA's counsel ("AA Notice of Motion," "AA Brief"), the affidavit of AA's counsel ("Cerasia Aff't"), and documents of which Criales had knowledge.

After his termination, Criales filed two discrimination charges against AA: (1) a February 5, 1992 charge with the EEOC ("EEOC Charge No. 160-92-1069," " '1069 Charge"), which was transferred for processing to the New York State Division of Human Rights ("NYSDHR"); and, after hearing

nothing for several months from the NYSDHR, (2) a second, December 3, 1992 charge with the New York City Commission on Human Rights ("NYCCHR"), which was transferred for processing to the EEOC ("EEOC Charge No. 160-93-0816," " '816 Charge"). The EEOC dismissed the '816 Charge as untimely filed, but on October 26, 1993 issued Criales a "right-to-sue" notice in connection with that charge.

I. Criales I

On November 18, 1993, Criales filed a *pro se* complaint in this court, *Criales v. American Airlines, Inc.*, 93-CV-5340 ("*Criales I*"), based on the right-to-sue notice for the '816 Charge. Since many of the decisive factors in this case turn on the disposition of *Criales I*, a brief synopsis follows.

After filing his initial complaint, Criales retained present counsel. On July 29, 1994, Criales amended his complaint to state national origin discrimination violations of Title VII and § 1981 and pendent state law claims of defamation and intentional infliction of emotional distress.

This court granted AA's motion to dismiss the Amended Complaint in *Criales I* in a Memorandum and Order of November 14, 1994 ("Memo"), familiarity with which is presumed. Briefly, the Court made the following conclusions and findings:

> 1. A timely filed charge was a prerequisite to a federal Title VII case. Since the right-to-sue notice on which Criales sued was predicated on an untimely filed EEOC charge, the Court found that Criales had

failed to meet a prerequisite for bringing the case. Therefore, the Title VII claims were dismissed.

2. Section 1981 created causes of action only for racial discrimination and that Criales' general allegations of national origin discrimination did not constitute claims of racial discrimination. Furthermore, that the 1991 amendment making harassment actionable under § 1981 applied prospectively only to conduct occurring after November 21, 1991. Criales failed to allege any specific instances of harassment occurring after the effective date of the amendment. Therefore, the § 1981 claims were dismissed.

3. Since the underlying federal claims were dismissed it had no jurisdiction to consider the pendent state law claims. Therefore, the state law claims were dismissed.

On December 1, 1994 Criales filed a *pro se* Notice of Appeal with the Court of Appeals for the Second Circuit. On January 31, 1995, during the pendency of the appeal, Criales obtained a right-to-sue notice for the '1069 Charge. Criales attempted to append the new right-to-sue notice to his appellate brief.

AA moved to strike that right-to-sue notice since it was not in the lower court record. Criales moved to withdraw his appeal without prejudice, which AA opposed. The Court of Appeals permitted Criales to withdraw his appeal in *Criales I* with prejudice and denied AA's motion to strike as moot.

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II. Criales II

This case ("*Criales II*") arises from the '1069 Charge, which Criales timely filed with the EEOC on February 3, 1992. On February 7, 1992, the EEOC notified Criales and AA by letter ("NYSDHR Referral Letter") that the '1069 Charge had been referred for initial processing to the New York State Division of Human Rights ("NYSDHR");[1] and that Criales and AA had the right to request EEOC review of the NYSDHR's decision. Cerasia Aff't Exh. B. The NYSDHR Referral Letter stated, "For such a request to be honored, you must notify the Commission in writing within 15 days of your receipt of the Agency's final decision and order." Cerasia Aff't, Exhibit B.

On August 29, 1994, the NYSDHR notifies Criales and AA by letter ("NYSDHR Dismissal Letter") that the '1069 Charge had been dismissed. Cerasia Aff't, Exhibit C. The NYSDHR gave "administrative convenience" as the reason for dismissing the '1069 charge, explaining that *Criales I* was being litigated in Federal Court, "in which forum all the issues concerning the question of National Origin discrimination can be resolved." *Id.* The NYSDHR Dismissal Letter also notified Criales and AA of their right to seek state judicial review of the NYSDHR's dismissal and of the accompanying waiver of their right to federal judicial review. *Id.*

As has been indicated, on January 31, 1995, during the appeal of *Criales I*, Criales requested, and was given, a right-to-sue notice for the '1069 Charge. Complaint, Exhibit A. On April 28, 1995, Criales filed this complaint based on that notice.

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1. The EEOC may not consider a claim until a state agency having jurisdiction over employment discrimination complaints has had at least 60 days to resolve the matter. Section 706(c) of 42 U.S.C. § 2000e-5(c).

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On July 10, 1995, AA moved to dismiss the complaint. Oral argument was held on October 20, 1995.

DISCUSSION

The chief issue in this case is whether the disposition of *Criales I* has a preclusive effect on the plaintiff's ability to maintain this action. In addition, the defendant raises other arguments in support of its motion to dismiss.

I. Motion to Dismiss Standards

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), the court must view all allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Ortiz v. Cornetta*, 867 F.2d 146, 149 (2d Cir. 1989). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Easton v. Sundram*, 947 F.2d 1011, 1014-15 (2d Cir. 1991), *cert. denied*, 493 U.S. 816 (1992). The court's consideration of a motion to dismiss is limited to the factual allegations in the complaint; documents incorporated by reference into the complaint; matters of which judicial notice may be taken; and documents either in plaintiff's possession or of which plaintiff had knowledge and on which plaintiff relied in bringing suit. *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993).

II. Res Judicata

In general, a defense of res judicata must be affirmatively

pleaded. Federal Rule of Civil Procedure 8(c) ("Rule 8(c)"). However, if all relevant facts are shown by the court's own records, the court may uphold a defense of res judicata on a motion to dismiss for failure to state a claim without requiring an answer. *Day v. Moscow*, 955 F.2d 807 (2d Cir. 1992). Therefore, AA has properly raised the defense of res judicata in their motion to dismiss.

Res judicata, or claim preclusion, prevents litigation of a matter that could have been raised and decided in a previous suit, whether or not it was raised. *Murphy v. Gallagher*, 761 F.2d 878, 879 (2d Cir. 1985) (citing *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984)). A final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1980).

The Second Circuit prescribed the following three considerations for determining whether the disposition of one claim operates as res judicata on another: (1) whether the same transaction or connected series of transactions is at issue; (2) whether the same evidence is needed to support both claims; and (3) whether the facts essential to the second were present in the first. *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38-39 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 977 (1993). With these considerations in mind, the Court will examine the possible preclusive effect of *Criales I* on each of the claims raised in this action.

III. Title VII and Section 1981 Claims

Section 1981 of 42 U.S.C. ("§ 1981") guarantees to all

persons within the jurisdiction of the United States the same rights under the law as are enjoyed by white persons. 42 U.S.C. § 1981. Section 1981 was amended in 1991 to provide remedies for intentional discrimination and to cover unlawful harassment in the workplace because of race. Pub.L 102-166, Nov. 21, 1991, 105 Stat. 1071, Civil Rights Act of 1991. The effective date of the amendment was November 21, 1991. *Id.*

Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000e *et seq.* ("Title VII"), is both broader and narrower than § 1981. Title VII is broader in that it covers other bases of discrimination, such as national origin, sex or religion, whereas § 1981 covers only racial discrimination. Title VII is narrower in that it provides for detailed administrative remedies that must be exhausted before the statute's protections may be invoked in federal court.

Courts are not allowed to infer any positive preference for Title VII or § 1981 where the statutes do in fact overlap. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). However, courts should be reluctant to read § 1981 broadly where the result is to circumvent the detailed remedial scheme constructed in Title VII. *Id.* Therefore, although claims of employment discrimination or harassment in the workplace due to race could be brought under both statutes, § 1981 should not be used to avoid the procedural prerequisites of Title VII.

A. Section 1981 Claims

Criales' First and Second causes of action, as stated in the Complaint, are: (1) employment discrimination based on national origin, Complaint, ¶¶ 4-37; and (2) wrongful discharge and disparate impact of employer regulations due to race.

Complaint, ¶¶ 38-69. Criales states that these claims arise under § 1981. Criales Brief, 8 n.2.

First, there is a threshold issue of whether Criales has made out any cognizable claims under § 1981. The Complaint states that the First cause of action is for national origin discrimination. Since § 1981 applies only to discrimination based on race, a cause of action for national origin discrimination cannot be brought under that statute. However, in the Brief, Criales treats the First cause of action as one for discrimination based on race, stating that "Hispanic, Latin and Race are all terms . . . which are not mere 'national origin.' " Criales Brief, at 8 n.3.

In the Second Cause of Action, Criales alleges many specific incidents where he was singled out for disparate treatment by AA. However, the only places in which Criales alleges that the disparate treatment was due to his race are paragraph 37, where he incorporates by reference all the allegations in the First cause of action, and a conclusory statement in paragraph 69, where he states that the disparate treatment he experienced "is evocative of a climate of racial hostility, and of intolerance for Hispanics in particular."

Even assuming that these thinly pleaded allegations are sufficient to raise claims under § 1981, there remains the much more serious hurdle of res judicata. The conduct complained of here is essentially the same as that charged in *Criales I*. Both concern Criales' term of employment at AA, both allege facts involving harassment over the public address system, and both complain of discrimination regarding the expense reimbursement investigation, the pretermination hearing, Criales' termination, and subsequent arbitration. The only difference here is that this time, Criales has attributed AA's alleged conduct to his race, rather than his national origin.

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Since the harassment and discrimination claims here arise out of the same transaction, evidence, and facts as those in *Criales I*, Criales cannot allege any differences as a reason for raising § 1981 claims again. *Woods*, 972 F.2d at 38-39. That Criales may have pleaded these claims with more specificity this time or attributed the alleged discrimination to a different factor does not create different transactions, evidence, or facts.

The § 1981 claims based on these transactions, evidence, and facts were dismissed in *Criales I* for failure to state a claim. A dismissal for failure to state a claim under Rule 12(b)(6) is a "judgment on the merits" for purposes of res judicata, *Federated Department Stores v. Moitie*, 452 U.S. 394, 399 n.3 (1981). Therefore the dismissal of the § 1981 claims in *Criales I* is a "judgment on the merits" for purposes of res judicata.

Since a final judgment on the merits precludes the parties from relitigating issues that could have been raised in a prior action, *Federated Department Stores*, 452 U.S. at 398, and since Criales could have raised § 1981 claims of racial discrimination as well as national origin discrimination in *Criales I*, the Court holds that res judicata precludes Criales from bringing a claim against AA under § 1981 for workplace harassment occurring between November 20, 1990 and December 20, 1991.

B. Title VII Claims

Criales argues that the dismissal of *Criales I* has no res judicata effect on his Title VII claims because that case was predicated on an untimely filed charge. In doing so, Criales draws an analogy between the dismissal of *Criales I* and a dismissal for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 41(b) ("Rule 41(b)").[2]

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2. . . . Unless the court in its order for dismissal

(Cont'd)

The analogy is inapposite. Ordinarily, a timely filed EEOC charge is a condition precedent to bringing suit in federal court under Title VII. *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 105 (2d Cir. 1978) (citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 555 n.4 (1977)); *Edmonston v. MGM Grand Air, Inc.*, 808 F.Supp. 197, 202 (E.D.N.Y. 1992) (opinion of this court citing cases).

Although a timely filed EEOC charge has been called a "jurisdictional prerequisite," *see, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 108 (2d Cir. 1978), the Second Circuit has given the requirement of *timeliness* the effect of a statutory prerequisite in all but the most extraordinary circumstances. *Dillman v. Combustion Engineering, Inc.*, 784 F.2d 57, 60 (2d Cir. 1986).[3] Because they are subject to equitable tolling and estoppel, "Title VII's administrative time limits are not jurisdictional." *Weiss v. Coca-Cola Bottling Co. of Chicago,*

(Cont'd)

> otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, *other than a dismissal for lack of jurisdiction*, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits.

Rule 41(b) (emphasis added).

3. For example, tolling of the time periods provided by statute may be appropriate where the defendant has actively misled the plaintiff respecting the cause of action, where the plaintiff has in some extraordinary way been prevented from asserting his rights, or where the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *Smith*, 571 F.2d at 108) (citing *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 237 n.10 & 238 (1976)).

990 F.2d 333, 335 n.1 (7th Cir. 1993) (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982)); *see also Bayer v. U.S. Dept. of Treasury*, 956, F.2d 330, 332 (D.C. Cir. 1992). Rather, "timely filing and receipt of a right-to-sue letter is a *statutory* pre-requisite to bringing a Title VII claim." *Edmonston*, 808 F.Supp. at 202 (citing *Miller v. International Telephone & Telegraph Corp.*, 755 F.2d 20, 22-23 (2d Cir.), *cert. denied*, 474 U.S. 851 (1985)) (emphasis in original).

The Court finds no extraordinary circumstances applicable here. Criales was represented by counsel in *Criales I* and thus had a means of acquiring knowledge of his rights and responsibilities under Title VII. *Smith*, 571 F.2d at 109-110. *Criales I* was dismissed for lack of a timely filed EEOC charge. Since a timely filed EEOC charge is a prerequisite to bringing suit under Title VII, the dismissal of *Criales I* was predicated on a lack of a statutory prerequisite, not a "lack of jurisdiction." Therefore, Criales cannot avail himself of the exception provided by Rule 41(b).

Since the Title VII claims here concern largely the same transactions, facts, and evidence as in *Criales I*, Criales' only argument against the application of res judicata is an appeal to the discretion of the Court to construe narrowly the preclusive effect of *Criales I*. Criales essentially argues that the issuance of the right-to-sue notice for the '1069 Charge implicates different "transactions, facts, or evidence" warranting a new case. The Court would have to find that Criales "could not have raised" the Title VII claims relating to the '1069 Charge in *Criales I* in order to permit Criales to raise them now.

Since "[a] party cannot escape the requirements of full faith and credit and res judicata by asserting its own failure to raise

matters clearly within the scope of a prior proceeding," *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 465 n.4 (1982), the issue is whether Criales' lack of a valid right-to-sue notice was caused by his own failure or by circumstances over which he had no control. The Court finds the cause to be the former.

While the absence of a valid right-to-sue notice may have rendered the claims in the '1069 Charge an improper subject for *Criales I*,[4] Criales failed to exercise available options for obtaining such a notice. Although the Court must draw all reasonable inferences in favor of the plaintiff, *Ortiz*, 867 F.2d at 149, the most reasonable inference that can be drawn from the pleadings is that Criales simply did not follow proper administrative procedure for obtaining a right-to-sue notice for the '1069 Charge.

Criales ascribes his delay in bringing this action to his "previous inability to obtain a right-to-sue notice." He explains that "the EEOC failed to provide a timely right-to-sue notice before this Court's dismissal of [*Criales I*]," but Criales has not alleged or made any showing that he attempted to obtain a right-to-sue notice or was in any way prevented from receiving one.

Criales ignored at least one of the most obvious alternatives for preserving his rights with regard to the '1069 Charge: EEOC review of the state agency's decision. The NYSDHR Referral Letter informed Criales of his duty to request EEOC review, if desired, within fifteen days after the dismissal of the charge by

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4. Since the December 3, 1992 charge was given a separate file number by the EEOC and was not consolidated with the February 5, 1992 charge, and since Criales had not obtained the requisite right-to-sue notice in connection with the February 5, 1992 charge, it was not a proper subject for *Criales I*. See *Smith*, 571 F.2d at 105, n.7.

NYSDHR. Since the NYSDHR Dismissal Letter notified Criales on August 29, 1994 that the charge had been dismissed, Criales could have requested review until about September 15, 1994. Since EEOC review would have been conducted only at the request of Criales, Criales cannot now assert his own failure to request review as "inability" to obtain a right-to-sue letter, absent a showing that he was refused such a request.

Criales also failed to pursue another means of obtaining review of the state agency dismissal of the '1069 Charge: state court review. Under New York election-of-remedies provisions, a state court lacks jurisdiction over employment discrimination claims once a charge is filed with a state agency, such as the NYSDHR. *Buscemi v. Pepsico, Inc.*, 726 F.Supp. 99, 100 (S.D.N.Y. 1989) (citing New York Executive Law § 297(9) (McKinney 1982 & Supp. 1989). A complainant's right to bring suit is restored if the NYSDHR dismisses the complaint on the grounds of administrative convenience. *Id.* Criales should have been aware that state court review was available, since the NYSDHR Dismissal Letter dated August 29, 1994 notified him of this option.

Finally, Criales failed to exercise an independent means of pursuing the allegations in the '1069 Charge: federal agency proceedings. Subsection (c) of 42 U.S.C. § 2000e-5(c) ("subsection (c)") provides that in "deferral" states such as New York,[5] a claimant may file a charge directly with the EEOC after sixty days of the commencement of state agency review,

5. New York is a state "which has a local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from [alleged unlawful employment] practice[s]" within the meaning of subsection (c). *See, e.g., Weise v. Syracuse*, 522 F.2d 397, 411-12 (1975).

or upon termination of such review, whichever is earlier. Since Criales filed the '1069 Charge on February 5, 1992, and since NYSDHR began review of the '1069 Charge on February 7, 1992, Criales could have filed a charge with the EEOC pursuant to subsection (c) sixty days after the commencement of NYSDHR's proceedings, or in April 1992. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 (1980).

If the EEOC then dismissed the charge, Criales would have received in due course a right-to-sue notice under 42 U.S.C. § 2000e-5(f)(1) ("subsection (f)(1)").[6] Since Criales never filed an EEOC charge pursuant to subsection (c), the EEOC could not have dismissed the charge, nor filed a civil action on behalf of Criales, nor entered into a conciliation agreement to which Criales was a party. As a result, the EEOC did not notify Criales of any of these occurrences pursuant to subsection (f)(1). Hence, Criales received no "right-to-sue" notice.

If Criales had chosen to pursue any of these options, he could have stayed *Criales I* and then sought leave of the Court

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6. If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) . . . , whichever is later, the Commission has not filed a civil action . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party . . . the Commission . . . *shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge* . . . by the person claiming to be aggrieved.

42 U.S.C. § 2000e-5(f)(1) (emphasis added).

to amend the complaint to add a Title VII claim based on a proper right-to-sue notice. *Woods*, 972 F.2d at 40-41. Therefore, the Court finds that Criales' failure to obtain a timely right-to-sue letter for the '1069 Charge does not justify the commencement of a new federal court case.

In lieu of exercising these options, the proper course for challenging the dismissal of *Criales I* would have been for Criales to pursue a direct appeal or a motion to modify or to vacate the judgment pursuant to Federal Rule of Civil Procedure 60. An adverse judgment from which no appeal has been taken is res judicata and bars any future action on the same claim. *Federated Department Stores*, 452 U.S. at 399 n.4. Much as he may regret it now, Criales voluntarily gave up his right to attack the dismissal of *Criales I* when he withdrew the appeal with prejudice. If Criales had maintained his appeal, the Second Circuit might have held, as it did in *Dalessandro v. Monk*, 864 F.2d 6 (2d Cir. 1988), that the suit should have been stayed rather than dismissed, and then modified or reversed the judgment accordingly.

The Court cannot grant relief here that Criales should have sought in a previous action. The res judicata implications on a final, unappealed judgment on the merits are not altered by the fact that the judgment may have been wrong. *Federated Department Stores*, 452 U.S. at 398. Criales seems to argue that his *pro se* status during the appeal should somehow excuse the withdrawal of the appeal with prejudice. Since Criales was represented by counsel during the motion to dismiss and before withdrawing his appeal, he had ample opportunity to exercise any of these options. The Court finds his failure to do so insufficient to exempt him from the effect of res judicata.

In making this finding, the Court is well aware that Title VII requirements "exist not for their own sake, but rather in furtherance of dispute resolution through accommodation rather than litigation." *Weise v. Syracuse*, 522 F.2d 397, 412 (1975) (citing *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972)). Nevertheless, the plaintiff cannot reopen the door to the federal courts after voluntarily closing them behind him. Since Title VII's time limitations are "specifie[d] with precision," *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), and since "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants," *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984) (per curiam), the Court cannot waive procedural requirements because the plaintiff failed on the first try.

Sound policy reasons underlie the Court's finding that Criales is precluded from making a second Title VII complaint for essentially the same behavior at issue in *Criales I*. If a plaintiff could file multiple EEOC complaints for the same conduct and were allowed to commence a separate action for each right-to-sue notice, a claimant could continue to sue on different notices until he achieved a favorable result. The administrative provisions of Title VII would be meaningless if a claimant could assert his own failure to invoke them as a basis for preserving the right to bring innumerable federal judicial proceedings. *See Soso Liang Lo v. Pan American World Airways, Inc.*, 787 F.2d 827, 828 (2d Cir. 1986). For all these reasons, the court finds that res judicata prevents Criales from bringing the Title VII claims in this action.

IV. Failure to State a Claim

Even if, as plaintiff urges, the Court treated this case as a

"different transaction" in order to escape the effect of claim preclusion, there would be other difficulties for Criales to surmount. The Court would have to consider whether the Complaint is within the scope of the underlying EEOC charge as well as the possible adverse effects of plaintiff's 52-month delay in bringing this action.

A. Scope of Complaint

A district court only has jurisdiction to hear Title VII claims that are included in an EEOC charge or that are based on conduct "reasonably related" to that alleged in the EEOC charge. *Butts v. City of New York Dept. of Housing*, 990 F.2d 1397, 1401 (2d Cir. 1993). To do otherwise would defeat the policy underlying the notice provision, which is "to encourage settlement of discrimination disputes through conciliation and voluntary compliance." *Id.*

Criales urges the court to construe claims of racial discrimination as "reasonable outgrowths" of the '1069 Charge. In the '1069 Charge, Criales marked "national origin" as the basis for discrimination and added

> I allege that I have been discriminated against on the basis of my national origin (Colombia) in violation of Title VII of the Civil Rights Act of 1964, as amended, in that there is inconsistency in Respondent's disciplinary policy.

The Court does not find racial discrimination claims "reasonably related" to Criales' underlying charge, which alleged only national origin discrimination. Criales could have included

"racial discrimination" as a basis for the '1069 Charge, but did not. Since Criales did not allege racial discrimination in the '1069 Charge, Criales cannot now broaden his complaint to include racial discrimination claims against AA.

In addition, the Court considered the difference between national origin discrimination and racial discrimination in *Criales I* and found the difference substantial. Memo, at 10 ("the Supreme Court did not interpret racial discrimination so broadly as to include discrimination based on 'national origin' ") (citing *Saint Francis College v. Al-Khazraji*, 481, U.S. 604, 613 (1987)). To allow Criales to sue on racial discrimination claims where the underlying EEOC Charge alleged only national origin discrimination would enable Criales to circumvent this Court's previous distinction and render the "reasonably related" standard all but meaningless.

Since Criales' underlying EEOC charge does not allege racial discrimination, Criales' Title VII claims of racial discrimination are not claims on which relief can be granted. Therefore, dismissal of Criales' claims of racial discrimination would be appropriate in any event under Rule 12(b)(6).

B. Statute of Limitations

Even assuming that the Court should treat the claims deriving from the '1069 Charge as an independent cause of action, the Court would have to consider the effects of Criales' long delay in bringing this action.

A court should look to state statutes of limitations for § 1981 actions. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987); *Tadros v. Coleman*, 898 F.2d 10, 12 (2d Cir.),

cert denied, 498 U.S. 869 (1990). The applicable statute of limitations in New York is three years. *Id.*; *Butts*, 990 F.2d, at 1412. Since the alleged discriminatory conduct ended on December 20, 1991, Complaint, ¶ 51, and since this action was commenced on April 28, 1995, more than three years after the alleged discrimination ended, New York law would bar the § 1981 claims. The pendent state law claims would be similarly barred.

Criales admits that the three-year statute of limitations would ordinarily bar this action, but argues that his § 1981 claims and pendent state law claims are subject to equitable tolling due to his "continued attempts to bring this case to a trial on the merits." However, for the reasons discussed above under "Res Judicata: Title VII Claims," the Court finds that Criales did not diligently pursue proper procedures for bringing this case to trial. For example, Criales could have instituted a state court action well within the New York statute of limitations, or sought a stay of *Criales I* while he obtained a proper right-to-sue letter.

Therefore, equitable tolling of the statute of limitations is unwarranted. The Court finds that the statute of limitations would bar Criales from maintaining the § 1981 and pendent state law actions at this time.

V. Summary Judgment

AA moves this court in the alternative for an order dismissing Criales' post-November 21, 1991 harassment claims pursuant to Federal Rule of Civil Procedure 56 ("Rule 56").

The Local Civil Rules of the Eastern District of New York provide in part that

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> Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contests there is no genuine issue to be tried. Failure to submit such a statement constitutes grounds for denial of the motion.

Local Civil Rule 3(g) ("Rule 3(g)"). AA, the moving party, provided such a statement.

The party opposing a motion for summary judgment must submit a statement of material facts as to which it contends there is a genuine issue to be tried. *Id.* The local rules further provide:

> All material facts set forth in the statement required to be served by the moving party *will be deemed to be admitted unless controverted* by the statement required to be served by the opposing party.

Id. (emphasis added).

Criales did not submit any statement in opposition to AA's Local Rule 3(g) statement. Therefore, the Court deems the facts in AA's Rule 3(g) statement to be admitted. The Court finds that a grant of summary judgment in favor of AA would be appropriate as an alternate basis for dismissal of this portion of defendant's complaint. *Dusanenko v. Maloney*, 726 F.2d 82, 84 (2d Cir. 1984) (per curiam).

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VI. Pendent State Claims

Criales concedes that if AA's motion to dismiss is granted as to the § 1981 and Title VII causes of action, there is no supplemental basis for pendent jurisdiction for the Third and Fourth causes of action, his state law claims. Criales Brief, at 6 n.1. Accordingly, those claims are dismissed for lack of subject matter jurisdiction. *Dunton v. County of Suffolk*, 729 F.2d 903, 910-11 (2d Cir. 1984).

VII. Relief

AA moves this court for an award of costs, attorney fees, and other appropriate relief. The Federal Rules of Civil Procedure provide for the award of costs "as of course" to the prevailing party unless the court otherwise directs. Fed. R. Civ. Proc. 54(d)(1); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987). The Court hereby directs otherwise and AA's motion for an award of costs and attorney's fees is hereby denied.

CONCLUSION

For the reasons discussed above, Criales is precluded from asserting claims against AA of wrongful termination under Title VII and claims of harassment or discrimination under 42 U.S.C. § 1981. As a result, the Court lacks supplemental jurisdiction to consider the state law claims of defamation, slander, and intentional infliction of emotional distress. Accordingly, defendant's motion to dismiss is granted; defendant's motion for costs and attorney's fees is denied; and the plaintiff's complaint is dismissed in its entirety.

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SO ORDERED

Dated: November 6th, 1995
Brooklyn, New York

s/ I. Leo Glasser
I. Leo Glasser, U.S.D.J.

Copies of the foregoing Memorandum and Order were this day sent to:

Joseph A. Bondy, Esq.
Canton & Jasper
276 Fifth Avenue
New York, New York 10001

Edward Cerasia II, Esq.
Seyfarth, Shaw, Fairweather & Geraldson
900 Third Avenue
New York, New York 10022

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED NOVEMBER 14, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-93-5340

MAURICIO CRIALES,

Plaintiff,

-against-

AMERICAN AIRLINES, INC.,

Defendant.

MEMORANDUM AND ORDER

GLASSER, United States District Judge:

This is a motion to dismiss brought by defendant American Airlines, Inc. pursuant to Federal Rule of Civil Procedure 12(b)(6). In its Notice of Motion, American Airlines also requests an award of costs and attorneys' fees.

BACKGROUND

For purposes of this motion to dismiss, the following facts are accepted as true. Plaintiff Mauricio Criales ("Criales") was employed by defendant American Airlines as a commercial airline mechanic from, on or about November 10, 1990 to December 20, 1991. Amended Complaint ¶ 6. Criales, an

American citizen, was born in Colombia and is of Colombian descent. Amended Complaint ¶ 5.

During the term of his employment, Criales alleges, he was subjected to ridicule and harassment by various employees of American because of his "Colombian ethnicity" and national origin. Amended Complaint ¶ ¶ 7-10, 12-20, 22-23, 26, 27-29. Criales' superiors and supervisors at American were aware, he alleges, that other employees were ridiculing him. Amended Complaint ¶ ¶ 11, 19, 21.

Criales was suspended by American Airlines on December 7, 1991, and was terminated by American, after an investigation into alleged expense account improprieties, on December 20, 1991. Amended Complaint ¶ ¶ 43, 44. Criales had been sent to a training course in Chicago from September 20, to October 18, 1991, and had been given a one thousand dollar spending allowance for that period. Amended Complaint ¶ ¶ 37 - 38.

Criales filed an expense report indicating that he had spent $729.00 of the $1,000 during the month-long course. Amended Complaint ¶ 39. Included in the $729 was $120 for dry cleaning expenses incurred in Queens, New York while Criales was home visiting his wife and children. Amended Complaint ¶ 40. Criales reported those expenses as having been spent at the Ramada Inn in Chicago, based on his understanding from fellow mechanics that " 'everybody' submitted receipts with their expense vouchers for things they had not paid for," and that American did not check expense reports. Amended Complaint ¶ 41. Criales also believed that he was entitled to charge his drycleaning expenses to American. Amended Complaint ¶ 41. Criales further alleges, on information and belief, that he "was singled out for investigation and was the only employee of

defendant American who had been investigated and terminated for expense report falsification since the course's inception." Amended Complaint ¶ 50.

In March 1992, Criales and his union presented his complaint to a three-member arbitration panel that confirmed that Criales' termination was for "just cause." Amended Complaint ¶ 45; Defendant's Memorandum in Support of its Rule 12(b)(6) Motion to Dismiss ("Defendant's Memo"), p. 9. Criales was not supplied with documents he requested in order to prepare for the arbitration and was precluded from discussing the acts of harassment at the arbitration hearing. Amended Complaint ¶ ¶ 46-48. Criales also states that American's management did not consider his complaints of discriminatory harassment and his dry cleaning receipts from Queens, during his pre-termination hearing. Amended Complaint ¶ 49.

The following facts are not based on statements made by Criales, but are based on documents submitted by American Airlines' counsel, together with his affidavit. Although there is some disagreement as to whether Criales' attorney had these documents in his possession, it does not appear to be disputed that Criales had knowledge of the relevant documents. On February 5, 1992, Criales filed a complaint under Title VII of the Civil Rights Act of 1964 with the Equal Employment Opportunity Commission ("EEOC"), which referred it to the New York State Division of Human Rights ("NYSDHR") on February 7, 1992. Cerasia Aff't, Exhibits B, C. In that complaint, Criales states that he "experienced harassment" during his employment with American and that he had been discriminated against on the basis of national origin, in that American's disciplinary policy was inconsistently applied. Cerasia Aff't Exhibit B. The date of the violation complained of is December

20, 1991, the date of Criales' termination. Thus, this claim appears to be limited to a charge of wrongful termination.

Criales also filed a complaint, against American and various employees of American, with the New York City Commission on Human Rights ("NYCCHR") on December 3, 1992, which was referred to the EEOC on January 6, 1993. Cerasia Aff't Exhibit A. That complaint alleged specific acts of harassment and charged that American Airlines "discriminated against him in the terms and conditions of his employment and terminated his employment on the basis of his national origin" in violation of the Administrative Code of the City of New York. Cerasia Aff't, Exhibit A, ¶ 18. Criales also charged that American Airlines "violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*, on the basis of his national origin." Cerasia Aff't, Exhibit A, ¶ 19.

Criales' December 3, 1992 claim was dismissed by the EEOC because it was untimely filed and a "right to sue" notice was issued on October 26, 1993. Amended Complaint, Exhibit A. Criales filed a complaint in this court on November 18, 1993; this Motion to Dismiss is addressed to the Amended Complaint dated July 29, 1994. On August 10, 1994, the NYSDHR issued a notice of its intention to dismiss Criales, February 5, 1992 claim because this claim had been filed in this court. Cerasia Aff't, Exhibit D. The NYSDHR did, thereafter, dismiss the claim on August 29, 1994. Defendant's Reply Memorandum in Further support of it Rule 12(b)(6) Motion to Dismiss ("Defendant's Reply Memo"), Exhibit 7.

The Amended Complaint alleges four causes of action: (1) "Employment harassment based upon national origin," Amended Complaint ¶ ¶ 4-29; (2) "Wrongful discharge from

employment based on national origin," Amended Complaint ¶¶ 30-51; (3) "Defamation based on libel and slander per se," Amended Complaint ¶¶ 52-61; and (4) "Intentional infliction of emotional distress." Amended Complaint ¶¶ 62-64.

DISCUSSION

I. Motion to Dismiss Standards

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must view all allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Ortiz v. Cornetta*, 867 F.2d 146, 149 (2d Cir. 1989). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Easton v. Sundram*, 947 F.2d 1011, 1014-15 (2d Cir. 1991), *cert. denied*, 493 U.S. 816, 112 S. Ct. 1943, 118 L.Ed 2d 548 (1992). The court's consideration of a motion to dismiss is limited to the factual allegations in the complaint; documents incorporated by reference into the complaint; matters of which judicial notice may be taken; and documents either in plaintiff's possession or of which plaintiff had knowledge and relied on in bringing suit. *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993).

As an initial matter, plaintiff asks the court to ignore Criales' December 3, 1992 complaint filed with the City of New York Commission on Human Rights, and the NYSDHR's notice of intention to dismiss the initial complaint filed by Criales. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss ("Plaintiff's Memo") p.4, fn. 4. Plaintiff's attorney

contends that he had neither knowledge nor possession of these documents at the time the Amended Complaint was filed and, accordingly, they may not be relied upon.[1] However, there does not seem to be any dispute as to *plaintiff's* knowledge or possession of these documents. Accordingly, the court may rely on these documents in considering this motion to dismiss. *Cortec Indus., Inc. v. Sum Holding Co.*, 949 F.2d 42, 48 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 1561 (1992).

II. Title VII claims

The timely filing of a charge with the EEOC and the receipt of a right-to-sue notice are statutory prerequisites to bringing a Title VII claim in the federal courts. *See*, e.g., *Edmonston v. MGM Grand Air, Inc.*, 808 F.Supp. 197, 202 (E.D.N.Y. 1992). As such, these requirements are subject to equitable modification when appropriate. *Hladki v. Jeffrey's Consol. Ltd.*, 652 F.Supp. 388, 392 (E.D.N.Y. 1987).

Criales clearly has not satisfied the statutory prerequisites to filing a Title VII claim. At the time he filed his complaint, Criales had received a right-to-sue notice based on an untimely filed charge (the December 3, 1992 charge). The complaint was not based on the charge that Criales had timely filed (on February 5, 1992) with the EEOC — that claim was before the NYSDHR (to which it had been deferred by the EEOC) when Criales filed his complaint in federal court. Thus, the only Title VII claim before this court is one based on the untimely charge that Criales filed with the NYCCHR on December 3, 1992.

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1. Ignoring these documents, plaintiff contends that, due to administrative error, a new case number was issued with respect to the complaint filed by Criales on February 5, 1992 and that, as a result of that renumbering, it was dismissed as untimely filed. Plaintiff's Memo, p. 3.

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This court, in *Hladki*, reviewed the reasons that would justify equitable modification of the statutory prerequisites to a Title VII action:

> "(1) when a claimant has received inadequate notice; (2) when a motion for appointment of counsel is pending; (3) when a court has led a plaintiff to believe that he or she has done everything required; (4) when affirmative misconduct by a defendant has lulled a plaintiff into inaction [citations omitted] . . . ; (5) when a 'plaintiff has in some extraordinary way been prevented from asserting his rights'; (6) when a plaintiff 'has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum' [citations omitted] . . . ; (7) when a right to sue letter has been received subsequent to commencement of a Title VII action and while the action is still pending, [citations omitted] . . . ; or (8) when the EEOC or Attorney General has incorrectly refused to issue a right to sue letter [citations omitted]."

Hladki, 652 F. Supp. at 393. Criales has not alleged that entitled to equitable consideration on the basis of any of these factors. Instead, Criales asserts that the right-to-sue letter on which he sued mistakenly referred to an untimely filed charge because of administrative error (that is, the renumbering of his original claim). Plaintiff's Memorandum, p. 15. However, plaintiff's claim of "bureaucratic inefficiency" is not supported by the documents. Plaintiff makes no attempt to correlate his claims

for relief to these documents, but rather asks the court to ignore several of the documents related to claims that he filed, and grant relief from the statutory prerequisites to a Title VII claim based on this revised state of events.[2]

Because Criales' claim is based on an untimely filed charge, he has not satisfied the statutory prerequisites for a Title VII claim. Neither has Criales presented this court with reasons justifying equitable modification of those requirements. Accordingly, defendant's motion to dismiss Criales' Title VII claims is granted.

III. Substantive claims: Federal Law

Section 1981 claims: Plaintiff's remaining federal claims are brought under section 1981, which prohibits discrimination by reason of race in making and enforcing contracts. Prior to the 1991 Act, harassment claims were not actionable under 42 U.S.C. § 1981. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Section 101 of the 1991 Act amended § 1981, effectively overruling *Patterson*, by defining the term "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). The 1991 Act amendment to § 1981 does not apply to conduct prior to November 21, 1991. *Rivers v. Roadway Exp., Inc.*, 114 S.Ct 1510, 1519-20 (1994). Furthermore, because the 1991 Act created liabilities for conduct

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2. In any event, a reading of the supporting documents in accordance with plaintiff's suggestion would limit his Title VII claim to one for wrongful discharge, as that was the only discrimination charged in Criales' February 5, 1992 complaint. However, Criales relies solely on § 1981 in prosecuting his wrongful discharge claim. Plaintiffs Memorandum pp. 21, 27-31.

that had no legal consequences previously, such pre-1991 Act conduct cannot be considered in determining the existence of a cause of action under § 1981. *Tillman v. St. Vincent's Hospital*, 1992 WL 426882 (S.D.N.Y.). Thus, in determining whether Criales has an actionable claim for harassment under § 1981, the court can only consider the conduct of defendant from November 21, 1991 until December 7, 1991 (the date Criales was suspended).

Before considering Criales' § 1981 claim, the court must consider whether the statute embraces discrimination based on national origin. In *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), the Supreme Court held that racial discrimination includes discrimination against "identifiable classes of persons . . solely because of their ancestry or ethnic characteristics." *Id.* at 613. The Supreme Court recognized that the "racial discrimination" that Congress intended to forbid could not be understood "in terms of modern scientific theory." at 613. Although "§ 1981, 'at a minimum,' reaches discrimination against an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive grouping of *homo sapiens*,' . . . a distinctive physiognomy is not essential to qualify for § 1981 protection." *Id.* However, the Supreme Court did not interpret racial discrimination so broadly as to include discrimination based on "national origin." Thus, the Supreme Court stated "If respondent . . . can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, *rather than solely on the place or nation of his origin*, . . . he will have made out a case under § 1981." *Id.* (emphasis added).

Although plaintiff, in his memorandum in opposition to this motion, attempts to equate national origin with "ancestry and

prevailing characteristics," the allegations in the complaint rely strictly on national origin. The Supreme Court's holding in *Saint Francis* precludes the plaintiff's argument that the term "national origin" is "synonymous with his ancestry and ethnic characteristics." Plaintiff's Memorandum, pp. 30 -31. Thus, because Criales' § 1981 claim for wrongful discharge is based on "national origin," that claim must be dismissed.

Similarly, except for a general allegation that "From the second day of his employment until the moment of his termination on December 20, 1991, Mr. Criales was subjected to intentional and continuous public ridicule and harassment with respect to his Colombian ethnicity," the acts complained of as the basis for Criales' § 1981 claim relate to discrimination based on national origin. Amended Complaint ¶ ¶ 1, 7. Criales alleges only one specific act of harassment based on "Colombian ethnicity." However, that act occurred from "on or about November 20, 1990 to November 27, 1990," prior to the effective date of the 1991 Act. Amended Complaint ¶ 10. Accordingly, Criales' harassment claim under § 1981 must also be dismissed.

IV. Arbitration Board's Non-neutrality

In his memorandum opposing this motion, Criales attacks the neutrality of the arbitration board that heard his claim. Although the Amended Complaint did not seek to set aside the board's decision, Criales asserts that the board's non-neutrality "when proven through further discovery, constitutes sufficient grounds to overturn the board's decision." Plaintiff's Memorandum, p. 2, n.2.

The bases on which a court may set aside the arbitration board's decision are limited to those set forth in Section 153

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First (q) of the Railway Labor Act: non-compliance, ultra-vires acts and fraud/corruption. *See Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 93 (1978). Criales, in relying on *Pacific & Arctic Ry. & Navigation Co. v. United Transp. Union*, 952 F.2d 1144, 1149 (9th Cir. 1991), appears to be implying that the arbitration board's partiality constitutes fraud.

As this court said in *Weik v. American Airlines*, CV-91-2617, to demonstrate fraud or corruption, a plaintiff must show more than "partiality," citing as examples cases in which one board member lied and misrepresented facts to other board members, or in which a party (or board member) had bribed a board member. *Pacific & Arctic Ry. & Navigation Co.*, the case relied on by Criales, also involved something more than partiality in the arbitration board's proceedings. In that case, an arbitration board member who exhibited partiality also had *ex parte* contacts with a member of the union's board.

The Amended Complaint filed by Criales includes allegations indicating that Criales was unable to obtain documents he requested in order to prepare for the arbitration proceeding and that he was precluded from discussing the harassment which he had experienced during the arbitration proceedings. Amended Complaint ¶ ¶ 46 - 48. Although these allegations might conceivably suggest partiality on the part of the arbitration board, they fail to allege anything more, which would be required for "partiality" to rise to the level of "fraud or corruption." *See Weik*, at p. 3.

Accordingly, this claim should be dismissed.

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V. State Law Claims

This court's dismissal of plaintiff's federal claims compels the dismissal of his state law claims for lack of subject matter jurisdiction. *Dunton v. County of Suffolk*, 729 F.2d 903, 910-911. Accordingly, this court will not discuss the merit of Criales' state law claims for defamation and intentional infliction of emotional distress.

CONCLUSION

Because plaintiff's complaint fails to set forth facts which would entitle him to relief, defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is granted. American Airlines' request for an award of costs and attorneys' fees is denied.

SO ORDERED.

Dated: Brooklyn, New York
November 14th 1994

s/ I. Leo Glasser
I. Leo Glasser, U. S. D. J.

APPENDIX D — DENIAL OF PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED APRIL 23, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-third day of April one thousand nine hundred and ninety-seven.

Dkt. No: 95-9170

Criales

Appellant,

v

American Airlines

Appellee.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee American Airlines, Inc.,

Appendix D

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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No. 97-152

Supreme Court, U.S.
FILED
AUG 11 1997
CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1996

AMERICAN AIRLINES, INC.,

Petitioner,

v.

MAURICIO CRIALES,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAURICIO CRIALES
PRO-SE Respondent

37-57 61 Street, 1st Floor
Woodside, New York 11377
Beeper (917) 419-1272

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Beeper (917) 419-1272

QUESTIONS PRESENTED

-1- Whether AMERICAN AIRLINES,INC. is acting in good Faith or not by Misrepresenting Facts and Lying to had Claimed in three separate Federal Lawsuits,(The most recent one a 97-CV-1460 (ILG) EDNY Removed from the SUPREME COURT STATE OF NEW YORK COUNTY OF QUEENS 1072/97 On February 12, 1997) To Claimed to have NO KNOWLEDGE of the Worse case of National Origin Discrimination based on Racial Hate, and Disparate Treatement Due to Race any Colombian Hispanic has ever been subjected in the Entire United States Aircraft Maintenance Aviation History.

--Including an ILLEGAL ARREST by the "FBI" Suffered By the Plaintiff Respondent., on June 10,1996 without any Warrants or the District Court Acknowledgement of their intentions. AMERICAN AIRLINES,INC. VICIOUSLY made No mention at all on their Petition of Writ about the "FBI" Arrest NOR that such Illegal Actions Created the FEDERAL LAWSUIT NOW PENDING at the Eastern District Of New York, Based on Malicious Prosecution based on Defamation,Conspiracy to Defraud, Intentional Infliction of Emotional Distress and Constitutional Violations of the First (1) and 14th Constitutional Ammendments Priviledges of the United States of America. Against AMERICAN AIRLINES,INC; EDWARD CERASIA II Esq. Counsel of Record here and the Same "FBI" AGENTS Who Conspired to Arrested me.

-2- Whether there are enough causes to bring CRIMINAL CHARGES Against American Airlines Inc, For Allowing a Climate of Racial Discrimination to a Licensed Federal Aviation Aircraft Maintenance Technician who performed sensitive Maintenance to Hundreds of Transport Aircraft at American Airlines Hangar 10 JFK Airport Under Extremately Hostile,Dangerous,Severe,Highly Pervasive Working conditions., for a long 13 months.

-3- Whether the Distric Court's dismissal of Criales I or 93-CV-5340 On Statue of Limitations Grounds was NOT an adjudication Upon the merits,but rather was a dismissal for lack of Jurisdiction based on an untimely right to sue letter Issue by the EEOC.

PLAINTIFF RESPONDENT PRO-SE DISCLOSURE STATEMENT

Mauricio Criales is an American Citizen for 21 YEARS Who was born in the Republic of Colombia, South America, and is Hispanic by descent.

Respondent Criales Served in the United States NAVY for Six (6) Years 1979-1985 .,All those Years Involved on Aircraft Maintenance on the Lockeed P3 Electra Aircraft used for Anti-submarine Welfare Missions around the World. Also, I am a Licensed Federal Aviation Administration FAA AIRCRAFT MAINTENANCE TECHNICIAN SINCE 1986.,Airframe and Powerplants Licenbsed.

Mauricio Criales is a Family man with Inmense Family Values Who's Four (4) Children 2 Boys and 2 Girls ages ranging from 1 1/2 to 10 Years, are all United States Born Citizens. Respondent Criales has been forced to reside with his Children BELOW THE POVERTY LEVEL in the United States at the Hands of American Airlines, Who has Defamed Plaintiff to all US Airlines,when requesting references, as well as dozens of Prosper Employers.

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*6 E.D.N.Y. Nov 6,1995..2d. Cir.95-9170 Reversed & Remmand
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.....
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Appendix E---Memorandum of Law Submitted by Plaintiff Respondent Criales on June ,1997 About the Arbitration Desicion at the EDNY to Honorable I Leo Glasser

Please Respondent Mauricio Criales is a Poor Person who at the present time Can not affort any legal Professional and Experience /Attorneys, Nevertheless I can Handle just fine Pro se I read a lot as for the laws concern, I know my Rights and Respecfully Request the Help of the United States Supreme Court To Help me Prove My Claims., Since 1990 I Had Collected Substantial Evidence to be WARRANT A TRIAL BY JURY To be Schedule as Soon as Possible.

The Fact is American Airlines has Delay this Action ONLY SO THEY CAN ABUSE THE "STATUE OF LIMITATIONS".THEY WILL NOT GET AWAY., I LOVE THE REPUBLIC OF COLOMBIA., I WILL NOT ALLOW TO BE DISCRIMINATED BASED ON NEITHER MY RACE OR MY NATIONAL ORIGIN.,OF HISPANIC ASCESTRY.

*****Additional Rules and Oppinions see., 9 Wright & Arthur R.Miller, Federal Practice and Procedure. Civil 2d Sect. 2373, at 405 (1995)----and-- 18 Charles A. Wright et at Federal Practice and Procedure, Jurisdiction Sect. 4437, at 347 (1981).....Appendix A.....10-12

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Mauricio Criales respectfully submit the following Brief In Opposition to Petition For Writ of Certiorari.

*

STATEMENT OF THE CASE

Respondent concur in part and dissents in part in the procedural history of the case set forth on pages 8 thru 20 of the petition for Writ of Certiorari submitted by Petitioners American Airlines, Inc. The Petitioner have neglected to inform the Court of many extremely important facts necessary for permitting the Court to determine whether a Writ of Certiorari should be granted in this case.

This action for damages caused by employment Harrasment,Racial Discrimination,disparate treatment,and Wrogful Termination of Employment,based on racial background and ancestry in Violation of the Title VII of the Civil Rights Act of 1965,42 U.S.C. 1981,and 2000(e),et seq. As amended by the Civil Rights Act of 1991,as well for Intentional Infliction of Emotional Distress,and for Defamation and Slander per se.

Petitioner American Airlines,Inc an AMR Corporation Has Failed to inform this Court That the Only Reazon Why I was Provided.,Finally with a timely Right to Sue by the EEOC IN New York was Only because I Contacted Mr. Paul RAMSHAW EEOC in Washington D.C. Since November of 1995, and Demanded that they finally provide a timely Right to Sue for a Complaint Rendered to them only 45 Days after American Airlines Singled me out and fired me 4 days before Chritmas of 1991.

I was Getting Nowhere as far as the EEOC in New York concerns, Because I used to call at least Once a Month and they kept telling me that the case was transfered to Long Island Office and that it was still Under Investigation.

Frustated and tired of Getting no where I have no choice but to complaint again this time with the New York State Division of Human Rights on September 25,1992 , exactly 250 days after American Final Termination. Of Dec20,1991 as clearly explained in the Court of Appeals Brief and Response in OPPOSITION to American Airlines Brief,Pages 7, 8,15 and pages 30,31,35,38,39 of my response in opposition to Brief for Defendant American Airlines I claimed that it was the EEOC Who Prevented me for Going Forward in the District Court and that I Had No control of the situation. bacause the EEOC Complaint filed February 5, 1992 ,45 days after American Ended my Job , and the Second Complaint to the NYSDHR ON September 25,1992 was 250 days after termination. **"The two Complaints meet the 300 day period as required by 42 U.S.C./2000-5[**8] In New York State Law.

The untimely Right to Sue Issued by the EEOC 160 93 0816 Clearly can apply in Hladki .v. Jeffrey Consol 652f.Supp 388,1987 U.S.Dis.Lexis 317;42 Fair emp #(5),

"When a Plaintiff" has in some extraordinary way been Prevented from asserting his rights timely. 2nd circuit Respondents Brief & Answer Page 38. 95-9170 (Jan 21, 1997). on this one particular reazon using RES JUDICATA Manifest Unfairness , "It refused to extent the Doctrine to a situation where it was Innapplicable.

Contrary to petitioners American Airlines Argument that I never Claimed justify equitable modification in Hladki.v. Jeffreys Consol Ltd. It is simply <u>NOT TRUE</u> TO THE Contrary it was part of the Plaintiff's Brief pages 7,8,48 and again on Pages 36,37 of the Response in Opposition toBrief for Defendant-Appelle American, Even more important is the Fact that it was part of the Oral Argument On April 19,1996.

I Argued that Hladki ,reviewed the reasons that would

justify equitable modification of the statutory prerequisites to a Title VII action:

> Let it be a fact,
>
> Amicus Curai, The EEOC,Argue.....
> that res judicata should NOT apply
> to situations like the one presented
> here, because application of the
> doctrine would be inconsistent with
> the Scheme of Title VII. While this
> Court is commited to giving full effect to the title VII administrative
> scheme Set up by Congress, The EEOC
> Opinion that the language and Policy of Title VII "DO NOT" Undercut
> the application of res Judicata,and
> we see No reazon Militating against
> application of well-settled claim
> preclusion Principles.

Title VII Prohibits employers from Discriminating on the basis of race,color,Religion,Sex or National Origin,42 U.S.C. 2000 e-2(a) throug (d) While giving an aggrieved employee access to the Federal Courts.

> Res Judicata has Never been broader than the Transaction to which it related. "claim".,Using res-Judicata to dissmiss a Title VII Lawsuit here Presented....will be improper,

This result will put Future Title VII Plaintiffs to the impermissible "Hobson's" choice of either Leaving their charges in the administrative process, Hoping that in the meantime there will be no adverse Judgment on other claims which will preclude their Title VII Claims.

AMERICAN AIRLINES ,INC.,intentions to use the doctrine of res-Judicata here Presented Totally Violates Title VII Policys.

Please view the Law priciples based on the fact that res-judicate here in Criales is innaplicable.
in a context of res judicata .,has never been broader than the transaction to which it related.
A plaintiff might have as many claims as there were theories of the substantive Law upon which he could seek relief against the defendant. Thus, defeated in an action based on one theory,the Plaintiff might be able to maintain another action based on a different theory, even though both actions were grounded upon the Defendants identical act or Connected acts forming a single-Life-situation.

REAZONS FOR THE DENIAL OF WRIT OF CERTIARARI

Petitioner American Airlines,Inc, request of Writ of Certiorari was made Frivolous,without merit, for Vexatious and for Delay for a MANDATE finally issue May 13, 1997 by the Court of Appeals for the Second Circuit, after having Denied American Airlines request on April 30,1997 for a 90 Day Stay of the Issuance of Mandate Pending Petition for Writ of Certiorari, as clearly explained in a Respondents Opposition for that request "American" can Not be granted a Writ , based on Dishonesty and misrepresentation of facts with this Court, based on EVIDENCE Submitted that Petitioners have a SUPREME COURT STATE OF NEW YORK COUNTY OF QUEENS. 1072/97 and a UNITED STATES EASTERN DISTRICT OF NEW YORK Lawsuits 97-CV-1460 Pending that are related to the same Continues Racial behavior against Plaintiff Pro se Respondent.

American Airlines, Inc., Themselves Admits that the Supreme Court State of New York County of Queens Complaint dated January 15,1997 is related to the same causes of action, when they requested Judge I Leo Glasser to REMOVED it out of State Court to the E.D.N.Y. on February 12,1997 see Appendix "C".

Even more Intersting is How Petitioner "American" FAILED to inform the Supreme Court of the United States the Fact that "American" attorney Edward Cerasia II,Esq. Here on record, CAN NOT be a Counsel of record in good Standing here because he is one of the primary Defendants charged in the Supreme Court Complaint 1072/97. He is accuse of Wrongful Conduct, Violating Ethics Rules and Mal-Practice.

Counsel Edward Cerasia II, Esq.,Malicious Prosecution Tactics were also reported to the,

SUPREME COURT APPELLATE DIVISION
FIRST DEPARTMENT
DEPARTMENTAL DISCIPLINARY COMMITTEE
41 Madison Ave
New York, New York 10010 Case # 97.2523

Since June 1997.

It was Requested based on Evidence that His Law Practice License to be Revoke and or Suspended for been so Vicious and Dishonest also.

FEDERAL BUREAU OF INVESTIGATIONS "FBI" Illegally arrested respondent Mauricio Criales June 10,1996, While the Court of Appeals decision was Pending, on 95-9170.

Plaintiff Respondent was FALSELY ACCUSE by American Airlines, Inc an AMR CORP., of the INFAMOUS LIES among others of Displaying a Semi-Automatic Firearm at a busy "American" La Guardia Airport Terminal sometime in May of 1996.

Plaintiff was Taken without any Warrants and was not Encarcerated, Four Months Later the "FBI" Complaint was Dismissed without Prejudice, because the Goverment find Out that NO ONE PERSON can Display a Semi-Automatic Fire= arm at a busy Airport Terminal and be Arrested 14 Days Later after the alledge Act Occurred.???. American Airlines is The Primary Defendant for such Vicious Bogus Fabricated Charges, Then, Failed to show up in Court to Prove it. I Keep signing Extensions to give them the chance to find causes for an Indictment,But thank to God the true Allways Prevails., "FBI" Investigation showed The True., Respondent

Criales in Fact Does Not Own or ever carry any Handguns of any Kind. I am like most of Japanese People who also Don't Believe in Guns. I don't even like to buy Toy guns to any of my Children.

Edward Cerasia II Esq.,"Americas" Attorney on Record here, is been charged with Malicious Prosecution, Conspiracy to Defraud, among others charges for Vicious Lies he told the "FBI" of Falsely making Threats to American Airlines , Only Because Respondent Mauricio Criales, Born in Santa Fé the Bogotá-Colombia Expresed His Opinion and Blame American Airlines of been Responsible of the DESTRUCTION of the 757 Aircraft Fly 965 That Crashed in the Mountains of Colombia December 20,1995.

I Claimed and Still do Today that 164 Inocent People who were Miserably Killed ., Could have been SAVED,If "American" were to follow the proper procedures.

Including the Fact that "American" Pilots FAILED to Report their Position to Tulua's "VOR" to the Airtraffic Controllers in Colombia, a city 4 minutes straight ahead to Cali-Colombia Alfonso Bonilla Airport.

Instead the Pilot Error (Whos According with Colombian Authorities was Intoxicated with high levels of alcohol) Selected and Executed the wrong Command on the FMC Computer "Flight Management Computer". and that the Proyected Route Line on the Electronic Map Display would have clearly Showed a Sharp Turn to the Left or a gross Deviation as the aircraft Turned 120 degrees EAST for 13 miles,Instead Heading Straight ahead for 4 (Four) more minutes.,Yet the approach Path and missed approach would have been VISIBLE Straight ahead, If the Captain of fly 965 was using the MAP But,apparently Not set to its 80 nautic miles or longer scale.

The crew had crossed over Tulua's "VOR" But Never Reported to the air traffic Controllers in Colombia,as required Instead they Fly over without even notice., I CLAIMED THAT ONE PARTICULAR MISTAKE, IF CORRECTED WOULD IT HAD SAVED EVERYONE., Including the Aircraft.

and..because Cockpit Conversations indicates the crew was Confused about the Aircraft's Position and Failure to perceive the "FMC" Iniciated Turn away from the intended routing Plan .

As Clearly Recorded the Pilot was more Interested Talking about the Holiday Season.
In their Pilot Training American Airlines Crews are Trained but Not Require to ensure that "FMC" Commands "look Right" before executing them.

Petitioner American Airlines, Inc., And AMR Corp. had Respondent Arrested by the "FBI" only Because they Know I was 100% Correct in my Claims; so, Fabricated the infamous, Slanderous Claims of the so called Semi-Automatic Firegun to Convense the "FBI" TO Arrested me June 10,1996. Monday Morning as I was busy Working at my Place of Employment as an FAA Part 145 Aircraft Accessories Repair Station FAA Licensed Mechanic for Arkwin Industries Inc , In Westbury Long Island, New York. In Front of my Co-workers and entire Staff, As if I was The "FBI MOST WANTED FUGITIVE CRIMINAL" ENOUGH to be FIRED by arkwin Industries 4Days Later.after Showing to work the next day of the Arrest based on.....
As they Put it CONVENIENCE and SAFETY WORK ENVIRONMENT, as the Verbal reazons for my Discharge.

American Airlines is Wrong, They got a Lot of Money ,so They think they Own the Eastern District Court House,But You are WRONG AMERICAN AIRLINES , No One is Above the Law in the UNITED STATES OF AMERICA, so Help us God !!!

As to be regarded as atrocious and utterly intolerable in a Civilized Society ., American Airlines and Edward Cerasia II HAD FAILED to "SHOW CAUSE" on Five Different Requests At the E.D.N.Y. (ILG) Since February 1997 Made by Respondent-Plaintiff to get to the bottom and the true about the so called semi-Automatic Firegun, because such Slanderous Claim in particular has caused respondents Criales Huge Inplications and Damaged to His Reputation for Life.

Respondent Criales Unemployed Since Arkwin Industries Fired me June 16,1996 to Today Surviving BELOW THE POVERTY LEVEL in the United States.

The Supreme Court of the United States Most Not Ignore The Imformation Provided here, to the Contrary As explained to the Court of Appeals, Only after "American" and the District Court Easthern District Solve all the Matters Pertaining to the Supreme Court State Of New York County of Queens Lawsuit, Removed and Approved by the E.D.N.Y. (ILGlasser) on February 12,1997, Only then this case can be Heard by a Higher Court.

Because Let it be a Fact that Defendant's Petitioner Circulation of the alledged "False and Defamatory" Complaint agains Plaintiff at the E.D.N.Y. on June 10,1996 Was not Protected as Fair and true report OF judicial Proceedings where it was alledged; without denial that action had been brought SOLELY to ruin Plaintiff's reputation and that circulation was intended to accomplish this improper purpose.

I. CRIALES II UNDER NO CIRCUNSTANCES CAN EVER BE RES JUDICATA

Dismissing Criales II, or 95-CV-1709 based on res judicata will be a great mistake , based on a timely right to sue Issued by the EEOC , Plaintiff Claims were Never been considered on any of the merits of the substantive claims brought in District Court Since 1993. Judge I Leo Glasser Told me Himself that it was only up to the Jury to hear the merits of any case. But Five Years Later I Have been Prevented From having this case hear at a trial on the merits.

The District Court Easthern District of New York Kept SILENCE about any Options that we May have in Criales I, or 93-CV-5340 (ILG) E.D.N.Y. NOT UNTIL Honorable Glasser

Had Already Issued his Memorandum and Order Dated November 14,1994 We Learned that the were Options available to Us to Either Dismissed without Prejudice or Request to Stay Pending the issue of a timely right to sue by the EEOC

.....BY THEN IT WAS TOO LATE·····

the final decision was Issued , Been Abandom by my Lawyer to-Appeal alone pro se at the Court of Appeals or 94-9289. I am a Very Poor person who have not been able to keep Counsel all during this two Lawsuits, Criales I was an Action entered in District Court in FORMA PAUPERIS On a Status Conference E.D.N.Y. Magistrate CHREIN Urged the the need for me to find Counsel.
The case was Taken by a Young recently appointed Lawyer, without having the financial means of Getting a more Title VII Experienced Lawyer.

I was Abandon to Appeal alone at the Court of Appeals In Criales I or 94-9289. Only after I Contacted Paul Ramshaw EEOC in Washington D.C. and Complained in Writing in a Letter Dated December 8,1995 Only Then was Issue a Timely right to sue letter for a Complaint Made timely to the EEOC IN New York only 45 Days after American Racial Discrimination Singled out Discharge.
Having been Issue a Timely right to sue on January 31,1995 by the EEOC. I Presentered to the Court of Appeals While an Oral Argument was Pending, I Contacted the same Counsel who Advised me to Drop the Court of Appeals Argument date without Prejudice. ...Requested...and Denied..
The Young Counsel Warned me that Unless I Drop the Oral Argument in the Court Of Appeals ,He will not be able to Represent me back in the District Court for the Second time. In Light of that I Argue with him that I wanted to Argue Pro se He Told me that Wont be Necessary because we had on our posetion the Timely Right to Sue Letter Honorable Glasser so Desperly Requested and that with it we'll had complied with the requirement.]

God Knows .,How many times If was Giving the chance to Argue I would it have blame the EEOC and the NYDHR for having caused a 250 days Complaint to be Untimely., In Fact I Claimed

see, Court of Appeals Plaintiff's Brief and Opposition that Claimed I was entitled to Justify equitable Modification in Hladki .v. Jeffreys Consol Ltd. 652 /F. Supp 388,392 (EDNY.1987) and Claimed equitable consideration on the basis of (1) (3) (5) (7) & (8) Hladki factors.

Once Honorable Judge I.Leo Glasser Dismissed the second Lawsuit Criales II or 95-CV-1709 Based on res judicata , I was abandon to Appeal alone for the second time., or 95-9170.

II. THE SECOND CIRCUIT'S DECISION IS TOTALLY CORRECT TO REVERSE THE JUDGMENT WHICH DISMISSED CRIALES'S TITLE VII CLAIMS ON RES JUDICATA GROUNDS AND TO UNANIMOUSLY VACATED THE DISMISSAL OF TWO NEW YORK STATE CLAIMS

The SUPREME COURT OF THE UNITED STATES OF AMERICA Ruled.,

> "The Peculiarly damaging nature of Employment discrimination is such,that the individual, who is Frequently Forced to face a large and powerful employer, should [***69]
>
> Be accorded every protection that [**2387] the Law has in its purview; and that the person Should not be forced TO SEEK HIS REMEDY IN ONLY ONE PLACE"
>
> Id;at 3371-3372.n11

Dismissing Respondent Mauricio Criales Tile VII Claims Without Considering the Merits of this action will be a sin;

Petitioners American Airlines, Inc.,Intentions to use the Doctrine of res judicata Violates Title VII policys.

"Title VII DO NOT Undercut the application of res judicata, their is no reazon militating agains application of well-settled claim Preclusion Principles,

American Airlines Use and abuse the Doctrine of res judicata as a rule of Judicial Economy to avoid having to answer and to defend itself on the merits as to the Substantive issues raised by Criales I or 93-CV-5340 and Criales II 95-CV-1709 and the two combined.

The Second Circuit's decision was proper . and unique based on a rather complex procedural history Contrary to Costello .v. United States ,365 U.S. 265 (1961) Rather the Court most view Plaintiffs Position and Responsabilities at Work,That Makes it an entire different Issues. Contrary than Costello Please view this National Security Issues, and Aircraft and Passenger Safety Guide lines that has Costs the Lives of Thousands of Inocent Passangers KILLED every year to most airliners. 73 % due to Human Error.

********* Plaintiff Mauricio Criales is a Federal Aviation Administration Aircraft Maintenance Technician, Who for 13 Months employed at American Airlines had Hundreds of Aircraft Inspected, Serviced, Troubleshooted and repaired.
Who's Primary responsability was the safety of Hundreds of Peoples Flying on those Aircraft and the Airwhortiness and safety of those Aircraft
'A Very Sensitive Position'
ENDURED UNDER HEAVY Hostile work environment conditions
EXTREMATELY DANGEROUS !!!!!!!!!!!!!!!!!
SUFFICIENTLY SEVERE !!!!!!!!!!!!!!!!!!
HIGHLY PERVASIVE !!!!!!!!!!!!!!!!!!!!
MOST CRIMINAL was American Airlines Employees behavior Turns me

"The safety of Passengers was in Danger"

"The Aircraft Airworthtines was in Danger"

"the safety of the Aircraft was in Danger"

American Airlines Employees including Crew Chiefs and Supervisors Worked Hard to Damaged my Credibility as a Knowledgeable Mechanic but in the process the safety of the Airplane and People's Lives were on my Hands, Not on the Hands of the Pilot who Flew that airplane, but in the hands of the mechanic, who repaired,Troubleshooted,Inspected Service and Repaired that Particular airplane during Overnight Maintenance.

-----That person was ME!

Title VII comes into play before the harrassing Conduct Leads to a nervous breakdown. Conduct was so severe and Pervasive that it created a work environment abusive that OFFENDS Title VII BROAD RULE of Workplace equality.

Based on Evidence that we all had to live with .,in TWA 800, The Valuejet trajedy in the Florida's Everglades, The American Airlines Destruction of fly 965 December 20,1995 near Cali-Colombia.,and thousands of close calls that never makes the six o'clock news, Suffered by all the airlines of the World " --NO EXCEPTIONS-- The FAA, Congress and the Supreme Court need to MANDATE For the safety of the United States Airline Aviation safety , to Issue an Order That who ever harrass, discriminates,mistreates and Threats Aircraft Maintenance Technicians , shall be Punish as any other Vicious Criminal and be charge with a Criminal Indictment.

III. THE SECOND CIRCUIT'S DECISION DO NOT CONFLICT WITH ANY OTHER DECISIONS OF ANY OTHER COURT OF APPEALS WERE THE SAFETY OF THE FLYING PUBLIC IS IN DANGER,UNTIL LAWS ARE CHANGE TO BETTER Protect AIRCRAFT MAINTENANCE TECHNICIANS FROM ANY SOURCE THAT CAN ENDANGER THE AIRCRAFT : INCLUDING VICIOUS HUMANS WHO ARE RACISTS

Respondent Tired of been mistreated at work and worry about the safety of the Aircraft Complained for the third time to his immediate Supervisor in September 10, 1991 and Threaten to call the "FBI" or Port Authority Police To Investigate that my work was been Sabotaged While I answer Daily Pranks in the Hangar's Public Address System. My Ex-Supervisor Has Never Denied I made Such Threats while Employed as an Aircraft Mechanic there.

Three (3) Months Later I was Fired for Life.
only because I was Doing my job properly by FEDERAL AVIATION ADMINISTRATION MANDATES, AND STANDARDS.
So I got Punish for Believing in safety and Integrity., That is Probably why The safety of Airtavel is in so much decline today.

Let it be a Fact for the /Record in this Supreme Court that Respondent -Appellant ,Respondent Charged American Airlines

with Racketeering and Conspiracy to defraud Under the Racketeer Influenced and Corrupt Organizations Act ("RICO") I CHARGED see Second Circuit's Brief That Defendants secretly conspired to deprive me of my Constitutionally Protected rights in their ---Hostile work environment
---In Investigating and Failed to Prosecute offenders
---Was defamed in a way that will interfere with future Job Possibilities.
---their activities was Criminal ,Danger,Life Threatening for the safe of the aircraft and the public Flying on them.

("RICO") ---for all the Illegal activities carry on at Kennedy International Airport New York by ORGANIZED Crime Known for Years, even by the common Citizen
---American Airlines Cocaine Trafficking Worlwide
---Alterations on Aircraft LOG BOOKS : , A Clear Federal Aviation Administration Violations

OF THE UNITED STATES OF NORTH AMERICA.

Plaintiff contends that his Complaint and motion papers demostrate genuine issues of material fact warranting a trial on the merits of two/1981 Claims: Criales 1981 Workplace Harrassment with Hostile work environment based upon National Origin and Wrongful Discharge from Employment based upon National Origin Because the Disparate impact Due to Race that May " Stand alone as a ground for relief"

When the work place is permeated with Discriminatory Intimidation,ridicule, and insult 477. U.S. at 65 that is

> "Sufficiently Severe or Pervasive to alter the conditions of the victim's employment and create an abusive working environment," at 67 TITLE VII IS VIOLATED!

Edward Cerasia II Attorney on Record Here Has Failed to provide Plaintiff Criales with Valuable Documents requested On a Discovery Request rule 26 on 93-CV-5340 dated back to June 28, 1994 ,Three Years Later On June 23, 1997 was Resubmitted When the Second Circuit Remanded to the Easthern District Court the Decision Reversed and Vacated.

I Charge that American Continues Manipulating the Law and that such action has to

Has to Stop , They are Provided and Ordered by Civil Procedures and Rules by rule 26 and 34 to provide the Discovery requested for three Years Now.

As for the Race Issue That I claimed in My Original EEOC Timely Complaint was Titled Wrong by the EEOC . I Claimed National Origin Based On Racial Hate for been of Hispanic ancestry. On Nazir Kahn .v. Pepsi cola Bottling group 526.F Supp.1268,27 fair Empl.Prac cas (BNA) 770;28 Empl.Prac (CCH) P 32,499 No. 81C1998 was a Highly Favorable Decision Against Seyfarth,Shaw,Fairweather & Geraldson, New York city Dec 2, 1981 This case represented by the same law Firm that American Airlines maintains in this action,

The Defendant moves to dismissed the Title VII Claim account of race only because Plaintiff EEOC Charge , did not allege discrimination on account of race. Khan will not be penalized because the EEOC Misplaced his Title VII Charge.

Note how Defendant's Seyfarth,Shaw, Fairwheather & Geraldson Motion to Dismiss is DENIED in all respects.

I Support the Post-November 1991 Conduct to the unfair, Illegal Arbitration on March 12, 1992 Until still Today . Please Most see Respondent Appendix E THAT Contrary to Amrican Airlines Arguments in their Petition for Writ of Certiorari is Lying When they Claimed that I only attacked the Arbitration Board's Non-neutrality It is a lie, it is not True. Please see the Memorandum of Law Provided to the District Court Easthern District of New York June 4.Here in Appendix "E" Were it Clearly States.

IV. **"THE ARBITRATION DECISION THAT I WAS SUBJECTED BY AMERICAN AIRLINES TO TERMINATE MY EMPLOYMENT MOST BE OVERTURN ON GROUNDS THAT IT WARRANT A RACIAL DISCRIMINATION LAWSUIT IN DISTRICT COURT NOW REAFFIRMED BY THE COURT OF APPEALS FOR THE SECOND CIRCUIT ON 95-9170**

This Document in Appendix "E" Clearly Demostrates American Tactics of Dishonesty by Misrepresenting Facts.

On Appeal at the second Circuit Please Notice that Honorable Judge Miner Concurs in Part and Dissents in Part by Separate Opinion Nevertheless.,ALL THREE CIRCUIT JUDGES UNANIMOUSLY agreed that the New York State Violations by American Airlines are actionables and were REVIVED as Judge Miner Put it in his own words

"Criales May bring his State Claims in State Court if he chooses to do so."

ON Appeal Respondent Criales Attacked time after time The Arbitration Decision, See Plaintiff Brief Pages 44,45

MY STORY WAS THE SAME AT THE ARBITRATION AS IT IS HERE NOW ; ALSO SEE MEMORANDUM OF LAW TO THE E.D.N.Y. HERE ON APPENDIX "E" 95-CV-1709

The Judicial review of Arbitation awards CHAPTER XXV IV. BASIC TEXT ON LABOR LAW
UNIONIZATION AND COLLECTIVE BARGAINING

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American Casebook Series,Hornbook Series and Legal Texts Nutshell Series of West Publishing Company st Paul, Minnesota 55165

Section 1 Backgroud: General Standard of Judicial review

An arbitrator is confined to interpretation and application of the Collective bargaining agreement; He does not sit to dispense his own brand of Industrial Justice. When the arbitrator's words manifest an infidelity to his obligation, Courts have no choice but to refuse enforcement of the award.

Section 2 Lack of Arbitral Jurisdiction

In short, it is the task of the Court in an action to confirm or to set aside an arbitrator's award to determine wheter the arbitrator has resolve the grievance by considering the proper sources, the contract and those circunstances out of which cames the "Common Law of the Shop"

Section 5 Violation of Law or Public Policy

On occasions, a Court will Vacate and award because of Unfair and Prejudicial exclusion or admission of evidence. Plaintiff Respondent Demanded that other Mechanics Expence Reports be also Investigated--not so-- Criales was the Only one nationwide. Singled out...Only as a Pretextual excuse to terminate My Employment They been out for Months. My Supervisor was Tired of My Complaints , Only made in effords TO Stop the Daily Constand Harrasement against me, and YES, YES, YES I Risked Complaining for The Safety Sensitive Maintenance Tasks Performed, To Protect My Work and the Safety of the Airplane That I was Assigned to work on. SAFETY FIRST.

A Court will also Vacate an arbitral award which requires conduct in Violation of State Law, Which are the Third and Fourth Causes of Action Included in all Complaints In District Court and the Second Circuit and=now the SUPREME COURT OF THE UNITED STATES OF AMERICA

The Arbitrator who base his decision not on the parties agreement BUT on Extrinsic Statutory Policy exceeds his Powers and render his award subject to Judicial attack.

The Supreme Court Rules[**69] and [**2387] Id.at 3371-3372.n11 and [**22] [**13] WAS VIOLATED AT THE EASTERN DISTRICT OF NEW YORK SINCE 1993 .

I did not get Such Treatment and or Protection on Either 93-CV-5340 or 95-CV-1709 E.D.N.Y. Brooklyn, New York.

The mistake I made While Employed at American Airlines Hangar 10 JFK Int'l Airport on How to charge for Dry Cleaning Incurred IT IS SO MICROSCOPIC Compare to the Huge Violations that I was Victimized for 13 months Including been subjected to Threats NOT TO COMPLAINT by my own Supervisor.

I Have been Accuse by American Airlines Inc ,an AMR CORP. of been a thief, Because of the Dry Cleaning receipts

BUT.....As clearly explained in the District Court and the Court of Appeals Briefs and papers.,Including rule 26 and 34 Discovery Request is one Huge Fact that most not be here be Ignored:

*** AMERICAN AIRLINES INC. NEVER PAY ME FOR TWO WEEKS VACATION PAY ACRUED DURING THE 13 MONTHS OF SERVICE TO THEM AS A FAA AIRCRAFT MAINTENANCE TECHNICIAN. Including the -interest***

I Lost my job for a tiny mistake for the first time, WHAT SHALL IT BE American Airlines Punishment be for Theirs????????

Because before they terminate my Employment for a First time Error they have Several Options of Disciplinary policies that Many other American Employees experienced, Who today still work for the Airline, Including All the Individuals Who Inflicted Permanent Damaged and who Discriminated me for Months. the options given to other Non Hispanics at "American" are ----Oral/Written Warnings
----Demotions
----Suspension and return to work
Criales was Never Given any of this Options.

BIAS AND PREJUDICE 100%
RACISTS AND VICIOUS 100%

Plaintiff,Apellant,Respondent Criales Never Had a Day in Court at the Eastern District of New York,Federal Court against Hundreds of Violations Suffered at the Hands of American Airlines Inc.

As to be reqarded as atrocious
and utterly intolerable in
A CIVILIZED SOCIETY

CONCLUSION

I HAVE NOT INCLUDE THE MERITS OF THE CASE HERE, IF I DO THAT THIS OPPOSITION BRIEF WILL BE HUNDREDS OF PAGES LONG,AMERICAN AIRLINES KNOWS WHAT I AM SAYING IS TRUE BEEN THE PRIMARY REAZONS FOR FIGHTING TO STAY AWAY FROM A TRIAL BY JURY, THEY DO NOT WANT THE WORLD TO KNOW WHO THE REALLY ARE.

Please, I Respecfully request that the Decision of the Court of Appeals be AFFIRMED for Justice and the true, by Denying Petitioner's Petition for Writ.
The Second Circuit Issue a Mandate May 13,1997 and Remmanded The Case to the District Court E.D.N.Y.
A Discovery Stage is Under way and all Discovery was Extended to January 8, 1998. Although still today American has Failed to Provide any Discovery Requested that by Federal Civil Procedures they have to provide. A TRIAL BY JURY MOST BE ___PRESERVED___

Please, I further Respecfully request that the Supreme Court Issue an Order to have this action Reassign by Lot at the Unites States District Court Eastern District of New York based on most Court of Appeals Rules, Example Rule 36 7th Circuit on Reassigment of Remmanded Cases , Orders ,that whenever a case tried in a District Court is remanded by this Court for a new trial it shall be Reassigned by the District Court for Trial before a Judge Other than the Judge who heard the prior Trial, This rule shall apply on remand.

The Fact of the matter is Plaintiff, Respondent Already Requested Orally and Later In Writting to Request Honorable Judge I Leo Glasser to "Recuse" Himself and to Have this case Reassigned by Lot But Honorable Glasser refused on a Memorandum and Order Signed by Him July 1, 1997.

The Problem with that is this.,

Honorable Glasser Dismissed Not 1. But 2. Federal Lawsuits. He Never Took any Jurisdiction to Any New York State Claims and Yet Removed From State Court an Action Entered since January 15,1997. Removed to the E.D.N.Y. Why? Supreme Court State Of New York County of Queens Judge LEVINE was Already Assigned to the 1072/97 Action. Right now the Complaint id DEAD in the District Court, Were I Requestedd American Airlines and Edward Cerasia II Esq. To "SHOW CAUSE" Of the Infamous Slanderous Lies Of Displaying a Semi Automatic Firegun at a Busy New York American Airlines Terminal.

THEY FAILED TO SHOW CAUSED and Warned me He will not Considered any other Requests ,because I Most follow the Proper procedures, and that is fine .,The Problem with that is that Has Prevented Plaintiff the Chance to Prove I was Defamed and I am Still been Prevented from Working=

> JUSTICE PLEASE, I HAVE A LARGE FAMILY TO SUPPORT A WIFE AND FOUR CHILDREN AGES 11/2, 6,8,10, THEY ARE NO BABIES ANY MORE AND DO NOT UNDERSTAND WHY I AM BEEN ACCUSE OF CARRYING A GUN THEY NEVER SAW AND WHY DADDY WHO'S AN Airplane Mechanic IS NOT WORKING AND OR PREVENTED FROM WORKING In an Era

Were Aircraft Mechanic are in so Much Demand Now than ever Before . Printed and Let It be for the Record that Mauricio Criales SAFETY RECORD IN AIRCRAFT MAINTENANCE IS IMPRESIVE ONE OF A KIND-CLEAN- With a Training Record Full of Safety AWARDS. Thanks to God I Never Been Injury on the Job, I Never Been off Work For any Injury Suffered in the Job.,Thanks to GOD. As for all the Bad things Poeple Talked About Colombians I can Tell you all,That the entire CRIALES FAMILY IS THE BEST EVER LEFT COLOMBIA. We all are Honest and Hard Working., Decent and Educated People.

I WILL SEEK JUSTICE I WILL NOT ALLOW PEOPLE TO INSULT ME AND FAMILY. WHEN THEY SLANDERED MOMS NAME ON THE WALLS AND BATROOMS AND LACKER ROOMS OF AMERICAN AIRLINES., HANGAR 10 at JFK AIRPORT. IN NEW YORK. UNITED STATES OF AMERICA.

Mauricio Criales 8-11-97

Respectfully submitted,

MAURICIO CRIALES
UNITED STATES CITIZEN

37-57 61 st 1st Floor
WOODSIDE, New York 11377
Beeper (917) 419-1272

Respondent ,Apellant,Plaintiff

may <u>God Bless the United States</u> of <u>America</u>

APPENDIX "A"

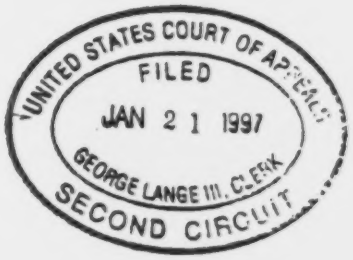
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of January, one thousand nine hundred and ninety-seven.

PRESENT: HON. Roger J. Miner
HON. Joseph M. McLaughlin
HON. Pierre N. Leval

Circuit Judges



Docket No: 95-9170

MAURICIO CRIALES,

Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC.,

Defendant-Appellee.

Appeal from United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the judgment of said district court be and it hereby is affirmed in part, vacated in part, and remanded to the said district court for further proceedings in accordance with the opinion of this court.

For the Court
GEORGE LANGE III, Clerk
By: Beth J. Meador
Beth J. Meador
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

EORGE LANGE III
CLERK

NOTICE

Local Rule effective July 1, 1992

0.40 Petitions for Rehearing

Each petition for rehearing shall include a copy of the opinion or summary order to which the petition relates.

If a petition for rehearing be found to be wholly without merit, vexatious and for delay, the court may tax a sum not exceeding $250 against petitioner in favor of his adversary, to be collected with the costs in the case.

July 1, 1992

rehrg_frm

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1390 ------ August Term, 1995

(Argued: April 19, 1996 Decided: JAN)

Docket No. 95-9170

MAURICIO CRIALES,

Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC.,

Defendant-Appellee.

Before: Miner, McLaughlin, and Leval, Circuit Judges.

Pro se plaintiff appeals from a judgment of the United States District Court for the Eastern District of New York (Glasser, J.) dismissing his discrimination complaint primarily on res judicata grounds.

Affirmed in part, vacated in part and remanded.

Judge Miner concurs in part and dissents in part by separate opinion.

MAURICIO CRIALES, Pro Se, Woodside, N.Y., for Plaintiff-Appellant.

EDWARD CERASIA II, New York, N.Y., (Seyfarth, Shaw, Fairweather & Geraldson, New York, N.Y., Of Counsel), for Defendant-Appellee.

LEVAL, Circuit Judge:

Mauricio Criales, appearing pro se, appeals from a judgment of the United States District Court for the Eastern District of New York (I. Leo Glasser, Senior Judge), dismissing his complaint. The complaint alleges in part that Criales's employer American Airlines, Inc. ("AA"), discriminated against him by reason of his Hispanic origin in violation of 42 U.S.C. § 2000e et seq. (codifying Title VII of the Civil Rights Act of 1964). The district court dismissed the complaint for a number of reasons including that the Title VII claims were barred by res judicata because of the previous dismissal of similar claims. In the unusual circumstances of this case, we conclude that the Title VII claims were not barred by res judicata.

We therefore reverse that portion of the judgment which dismissed Criales's Title VII claims on res judicata grounds.

I. Background

This case has a rather complex procedural history, which we explain here in some detail because it is crucial to our decision.

Criales is an American citizen who was born in the Republic of Colombia and is Hispanic. In November 1990, he was hired by AA to work as an airline mechanic at John F. Kennedy International Airport. The complaint alleges that his co-workers harassed and ridiculed him because of his Latino origin, and that

AA officials condoned this harassment.

On December 7, 1991, AA suspended Criales while it investigated an allegation that he had filed a false expense report relating to his attendance at a training course in Chicago. Criales maintains that, at the hearing on his alleged misconduct, he tried unsuccessfully to assert his allegations of discriminatory harassment. Criales was terminated on December 20, 1991. On March 12, 1992, he and his union contested the termination before an arbitration panel, which upheld the dismissal.

Without the aid of counsel, Criales filed two administrative charges against AA alleging discrimination because of his national origin. The first charge, dated February 5, 1992, was filed with the Equal Employment Opportunity Commission ("EEOC") within the time allowed by Title VII. The EEOC transferred this charge for processing to the New York State Division of Human Rights ("NYSDHR"). After a number of months with no response, Criales filed a second similar charge, dated December 3, 1992, this time with the New York City Commission on Human Rights ("NYCCHR"); it was transferred for processing to the EEOC. The second charge was not filed within the time allowed by Title VII. These two charges each alleged discrimination on the basis of national origin, and were based substantially on the same allegedly discriminatory conduct. Compare Brief of Appellant, Exhibit B, with id., Exhibit C. The EEOC dismissed the December 1992 charge because it was not timely filed, and issued a right-

to-sue notice in connection with that charge on October 26, 1993.

On November 18, 1993, after receiving the right-to-sue notice based on the untimely December 1992 charge (but before receiving a right-to-sue notice on his timely charge), Criales filed a pro se complaint in the district court. Criales then retained counsel and amended his complaint in several respects, adding claims under 42 U.S.C. § 1981, and pendent state law claims of defamation and intentional infliction of emotional distress. AA moved to dismiss the complaint for failure to state a claim. The district court granted the motion, ruling that Criales's Title VII claims must be dismissed because the underlying administrative charge (the one filed in December 1992) was not timely filed. Criales v. American Airlines, Inc., 93 Civ. 5340 (E.D.N.Y. Nov. 17, 1994)("Criales I"). The other claims were dismissed for various reasons that are not of significance to this opinion. On December 1, 1994, Criales, no longer represented by counsel, filed a pro se notice of appeal with this court.

Meanwhile, his first charge was making its way through the administrative process. As noted above, this timely charge had been referred by the EEOC for initial processing to the NYSDHR. On August 29, 1994, recognizing that Criales's complaint stemming from the second charge was being litigated in district court, the NYSDHR dismissed the timely charge for "administrative convenience" on the rationale that the litigation of the second charge in the district court would resolve all the issues raised

in the first charge. On January 31, 1995, while his appeal was pending, Criales received a right-to-sue notice on the timely charge.

Apparently seeking to inform this court that he could now proceed on the timely charge, Criales attempted to append his right-to-sue notice on the timely charge to his appellate brief. AA moved to strike the right-to-sue notice from Criales's brief on the grounds that it had not been in the record below. Criales then moved to withdraw his appeal without prejudice so that he could, as he put it in his motion papers, "seek judicial remedy in the Eastern District of New York on the basis of a newly issued, timely 'Right to Sue' letter by the EEOC." AA opposed the motion, and it was denied by this court on May 26, 1995, in an order stating that Criales would be permitted to withdraw his appeal with prejudice. On August 8, 1995, this court granted Criales's pro se motion to withdraw his appeal with prejudice.[1]

Criales (represented again by counsel) then filed a new complaint in the district court based on the new right-to-sue notice granted on the first, timely charge. AA moved to dismiss the complaint. The district court granted the motion, ruling that Criales's claims of discrimination under Title VII were barred by res judicata. Criales v. American Airlines, Inc., 95 Civ. 1709, 1995 WL 669900 (E.D.N.Y. Nov. 6, 1995)("Criales II"). The other federal claims were dismissed on various grounds, and

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[1]Although Criales filed this motion pro se, he indicated at oral argument that he did so after receiving informal advice from his former attorney.

the state claims were dismissed for lack of jurisdiction, by reason of the absence of a valid federal claim to which they could be appended.

This appeal followed.

II. Discussion

The primary question raised by this appeal is as follows: Where a plaintiff filed two administrative charges alleging illegal discrimination under Title VII -- one timely, the other untimely -- and instituted suit upon the agency's delivery of a right-to-sue notice on the untimely charge, which suit was then dismissed by reason of the untimeliness of that charge, does that dismissal operate as an adjudication on the merits, barring the plaintiff from proceeding upon the timely charge? The district court believed it did. We disagree.

The prerequisites for a suit under Title VII include a timely filed administrative charge and timely institution of the suit after receipt of a right-to-sue notice. See 42 U.S.C. § 2000e-5(e)(1)(timely charge) & (f)(1)(right-to-sue notice); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47, 94 S. Ct. 1011, 1019 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798, 93 S. Ct. 1817, 1822 (1973). Criales complied with both requirements. The only reason for the dismissal was that he had previously filed a suit, based on an untimely administrative charge, which suit was dismissed because of the untimeliness of the charge. Although the district court viewed the problem as

one of untimeliness, it is more appropriately seen as one of prematurity. Had Criales waited to file his suit until receipt of the right-to-sue notice on the timely charge, there would have been no defect. The superfluous untimely administrative charge would have been irrelevant to Criales's right to proceed on his timely charge. His problem was that he filed the initial complaint without waiting for the issuance of the right-to-sue notice based on his timely charge.

Like any other dismissal for failure to exhaust administrative remedies, a dismissal of a Title VII action by reason of a plaintiff's failure to wait for a right-to-sue notice is not a bar to instituting the suit after the notice is delivered. See, e.g., Johnson v. Nyack Hosp., 86 F.3d 8, 10 (2d Cir. 1996)(noting district court's dismissal without prejudice for failure to exhaust administrative remedies); see also Twitty v. Smith, 614 F.2d 325, 335 n.16 (2d Cir. 1979)(dismissal for failure to exhaust state remedies is without prejudice). There is no reason why the result should be different here merely because plaintiff had filed a second administrative charge that was superfluous and untimely.

The district court believed the bar to suit was mandated by the terms of Rule 41(b) of the Federal Rules of Civil Procedure, which provides

> Unless the court in its order for dismissal otherwise specifies, . . . any dismissal . . ., other than a dismissal for lack of jurisdiction, [or for other specified reasons not here pertinent] operates as an adjudication on the merits.

The district court noted that courts have found the administrative time limits of Title VII to be subject to equitable tolling and estoppel and have thus considered them to be "not jurisdictional." Criales II, 1995 WL 669900, at *6. The court thus concluded that the dismissal for untimeliness of the charge was not within the "lack of jurisdiction" exception of Rule 41(b), and that it operated as an adjudication on the merits.

The teachings of the Supreme Court in Costello v. United States, 365 U.S. 265, 81 S. Ct. 534 (1961), require a different analysis and result. The Court there considered whether a district court's dismissal of a denaturalization action, because of the government's failure to file an affidavit of good cause, barred the government from filing a new complaint with the proper affidavit. The district court had not designated the dismissal as jurisdictional, nor had it stated whether the dismissal was with or without prejudice. 365 U.S. at 268, 81 S.Ct. at 536. The Court ruled that, despite the district court's silence on the question, the dismissal was jurisdictional within the meaning intended by Rule 41(b), and thus without prejudice. 365 U.S. at 285; 81 S. Ct. at 544. The Court noted that the term "lack of jurisdiction" as used in Rule 41(b) was a term of art, 365 U.S. at 287, 81 S. Ct. at 546, encompassing failure to comply with statutory prerequisites, 365 U.S. at 285, 81 S.Ct. at 545. Writing for the Court, Justice Brennan referred to the exception in Rule 41(b) for certain enumerated dismissals that are without

prejudice, and explained:

> We regard the exception as encompassing those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim.

365 U.S. at 285, 81 S.Ct. at 545. The origins of this exception, according to Justice Brennan, were in the common law rule that "dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim." Id. Justice Brennan noted that this principle had been applied at common law in many cases involving motions to dismiss by a defendant, and that Rule 41(b) did not alter this rule. He quoted Hughes v. United States, 71 U.S. (4 Wall.) 232, 237 (1866), accordingly: "If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." 365 U.S. at 286, 81 S.Ct. at 545.

Shortly thereafter, we interpreted Costello to mean that

> the preclusive effect afforded dismissals by Rule 41(b) was intended to apply only to those situations in which a defendant must incur the inconvenience of preparing to meet the merits of the plaintiff's claims because there is no initial bar to the court's reaching the merits as there would be, for illustrative purposes, if there were a defect in pleadings or parties.

Nasser v. Isthmian Lines, 331 F.2d 124, 127 (2d Cir. 1964); see also Saylor v. Lindsley, 391 F.2d 965, 967, 969 (2d Cir. 1968) (in light of Costello, dismissal of derivative suit for failure

to post bond, despite being labeled "with prejudice," did not bar subsequent suit by another stockholder because defendants were not required to prepare defense and court did not reach merits of plaintiff's substantive claim); Papilsky v. Berndt, 466 F.2d 251, 256-57 (2d Cir.) (similar), cert. denied, 409 U.S. 1077, 93 S.Ct. 689 (1972); 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, Civil 2d § 2373, at 405 (1995) ("[C]ourts have recognized that Rule 41(b) does not apply in situations in which a case is dismissed because of some initial bar to reaching the merits of the plaintiff's claims . . . ."); 18 Charles A. Wright et al., Federal Practice and Procedure, Jurisdiction § 4437, at 347 (1981) ("In ordinary circumstances a second action on the same claim is not precluded by dismissal of a first action for prematurity or failure to satisfy a precondition to suit.").

Like the government's failure to file an affidavit of good cause in Costello, Criales's filing of a complaint based on an untimely underlying administrative charge, where he also had filed a timely charge upon which he had not yet received his right-to-sue notice, "simply constituted non-fulfillment of a prerequisite to the initiation of the proceedings." Weston Funding Corp. v. Lafayette Towers, Inc., 550 F.2d 710, 713 (2d Cir. 1977) (interpreting Costello). AA had not been "put to the necessity of preparing a defense." Costello, 365 U.S. at 287, 81 S. Ct. at 546. Plaintiff had not yet fulfilled a statutory prerequisite to suit, but remained capable of fulfilling it. His suit was premature.

The district court's initial characterization of the first dismissal as being due to Criales's failure to satisfy a "statutory prerequisite[]" was entirely correct. Criales I, slip op. at 7, 8. The court described the dismissal in similar terms when it dismissed the Title VII claims in Criales's second complaint on res judicata grounds, stating that the first dismissal had been "predicated on a lack of a statutory prerequisite . . . .'" Criales II, 1995 WL 669900, at *6. The court went on, however, to conclude that a dismissal predicated on lack of a statutory prerequisite was not based on a "lack of jurisdiction." Id.

In light of Costello, Nasser, and similar decisions, the district court was drawing a distinction where one should not have been drawn. Criales simply had failed to comply "with a precondition requisite to the Court's going forward to determine the merits of his substantive claim." Costello, 365 U.S. at 285, 81 S. Ct. at 545. Because he remained capable of complying with that precondition by instituting his suit after receipt of the right-to-sue notice on the timely charge, the dismissal of the first complaint should not have been found to operate as an adjudication upon the merits and as a bar to the subsequent complaint filed after the precondition had been satisfied. It was a dismissal "for lack of jurisdiction" within the special meaning of that term in Rule 41(b), as explained in Costello. See Truvillion v. King's Daughters Hosp., 614 F.2d 520, 524 (5th Cir. 1980)("Because a dismissal for failure to meet a condition

for filing suit does not operate as an adjudication upon the merits, it cannot bar a subsequent suit between the parties.")(internal quotations omitted).

We recognize that the district court's dismissal of Criales's complaint arising from his untimely charge was styled as a dismissal for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and that dismissals under Rule 12(b)(6) are generally considered judgments on the merits, unless the court specifies otherwise. See Federated Dep't Stores, Inc., v. Moitie, 452 U.S. 394, 399 n.3, 101 S.Ct. 2424, 2428 n.3 (1981).

Nonetheless, we would not permit the choice of labels to distort substance, especially where the consequence would be so drastic as to deprive a party of the opportunity to be heard. Regardless whether characterized as a failure to plead the necessary elements of his cause of action, or as failure to comply with all the statutory prerequisites, the reason for the first dismissal was that plaintiff had not waited until receipt of the right-to-sue notice on his timely administrative charge. To consider it an adjudication on the merits of his discrimination complaint is a distortion.

Furthermore, some authorities hold that a Rule 12(b)(6) dismissal "will not bar a second action if new facts have come into existence or have been alleged for the first time and it was the absence of these facts that made the first complaint defective." 9 Charles A. Wright & Arthur R. Miller, Federal

Practice and Procedure, Civil 2d § 2373, at 408 (1995) (citing cases). Here, the pertinent new fact was that Criales's second complaint was based on the EEOC's delivery of a right-to-sue notice upon Criales's timely charge.

The district court also noted that Criales had procedural means at his disposal either to compel the issuance of a right-to-sue notice on his timely complaint prior to the dismissal of his first action, or to convince the court to stay, rather than dismiss, the first action while awaiting the issuance of the right-to-sue notice on the timely charge. These observations were all true but, in our view, irrelevant to whether the dismissal of the initial action should have been considered an adjudication on the merits.[2] If anything, by stressing the simple procedural devices by which Criales might have avoided the drastic ruling, the district court's observations underscore the inappropriateness of denying him the opportunity to have his claim adjudicated. Cf. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 397, 102 S. Ct. 1127, 1134 (1982)("a technical reading [of Title VII] would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process'") (quoting Love v. Pullman Co., 404 U.S. 522, 527, 92 S. Ct. 616, 619 (1972)).

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[2]No contrary inference may be drawn from this court's denial of Criales's motion to withdraw his first appeal without prejudice. The prejudice in question related to the appeal of the first action. There was no suggestion that Criales's voluntary dismissal of the appeal should bar him from proceeding to file suit upon his timely charge, which is what he had told this court he intended to do.

We noted in Fay v. South Colonie Central School District, 802 F.2d 21, 29 (2d Cir. 1986), that "[i]n properly seeking to deny a litigant two 'days in court', courts must be careful not to deprive him of one." (quotation marks and citation omitted). Because plaintiff never had a day in court on his Title VII claims, and because his initial suit was dismissed by reason of a curable defect -- his failure to satisfy a statutory prerequisite -- we reverse the part of the judgment which held that res judicata barred those claims.[3]

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[3]Samuels v. Northern Telecom Inc., 942 F.2d 834 (2d Cir. 1991), does not require a different result. In that case, the plaintiff voluntarily dismissed his first action "with prejudice" and his stipulation to this effect was so ordered by the court. Under Rule 41(a) such a dismissal so ordered with prejudice acts as an adjudication on the merits.

In contrast, the dismissal of Criales's complaint did not arise under Rule 41(a); rather, it was an involuntary dismissal under Rule 41(b), imposed because of Criales's failure to wait for the right to sue letter on his first administrative complaint. By the terms of Rule 41(b), an involuntary dismissal is on the merits unless it is a dismissal for lack of jurisdiction (as well as other specified exclusions). As explained above, Costello makes clear that a dismissal in these circumstances (for failure to comply with a statutory prerequisite to suit) operates as a dismissal for "lack of jurisdiction." Unlike the dismissal in Samuels, such a dismissal was not on the merits. Indeed, the judge did not say the dismissal was with prejudice. After the involuntary dismissal of his first action by reason of his failure to comply with the statutory prerequisite, Criales was free to file his second complaint without preclusion.

The dismissal "with prejudice" of Criales's appeal in his first action did not convert the prior dismissal of that action from one for lack of jurisdiction to one on the merits. The judgment of the district court remained what it was -- a dismissal for lack of jurisdiction without preclusive effect. It could not be changed by the taking or dropping of an appeal. Thus, when Criales voluntarily dismissed his appeal from the first action with prejudice, that terminated the first action. It did not transform the dismissal from one for lack of jurisdiction to one on the merits.

We find no error in the district court's dismissal of the remaining federal claims. As to the pendent state claims, however, the district court dismissed these for lack of subject matter jurisdiction because there was no federal claim to which they could be appended. Our direction that Title VII claims be reinstituted nullifies the rationale for that ruling. The dismissal of the state claims is therefore also vacated.

III. Conclusion

The portions of the judgment dismissing plaintiff's Title VII claims on grounds of res judicata and dismissing pendent state claims are vacated. The dismissal of the remaining federal claims is affirmed. The action is remanded for further proceedings.

MINER, Circuit Judge, concurring in part and dissenting in part:

Because I agree with the district court that Criales' Title VII claims are barred by res judicata, I respectfully dissent from so much of the majority opinion as vacates the judgment dismissing the Title VII claims and pendent state claims. I concur in the majority opinion to the extent that it dismisses the remaining federal claims.

The prior action brought by Criales was dismissed as to the Title VII claims for untimely filing of his second employment discrimination complaint with the EEOC. The majority opinion acknowledges that the dismissal of the Title VII portion of the complaint in that action was grounded in Criales' failure to state a Title VII claim, Fed. R. Civ. P. 12(b)(6), and that such a dismissal generally is considered a judgment on the merits. See Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 399 n.3 (1981).

My colleagues nevertheless see the dismissal of the prior action as being for lack of jurisdiction within the intendment of Fed. R. Civ. P. 41(b) and therefore without prejudice to the bringing of a new action based upon the earlier timely filing with the EEOC. This analysis is predicated in the main upon the decision of the Supreme Court in Costello v. United States, 365 U.S. 265 (1961). In that case, the Court held that dismissal for the government's failure to file a statutorily required affidavit of good cause in a denaturalization action was for lack of jurisdiction under 41(b) and therefore without prejudice. There,

the district court had not classified the dismissal as without prejudice or for lack of jurisdiction.

Aside from the fact that the district court in the opinion giving rise to this appeal makes it clear that the dismissal of the previous action was not intended to have a jurisdictional basis, precedent compels us to arrive at the same result. The Supreme Court could not have been more clear on this subject:

> We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.

Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). Whatever may have been the rule in Costello, it cannot be applied in a Title VII action involving untimely filing with the EEOC. It is because the "statutory requirement is analogous to a statute of limitations," Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 712 (2d Cir. 1996), that dismissal for failure to comply with the requirement is a judgment on the merits. See PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 896-97 n.2 (2d Cir. 1983) (holding that a dismissal on statute of limitations grounds is an adjudication on the merits for purposes of res judicata).

Although the result envisioned by the foregoing is most unfortunate, it could have been avoided. Criales could have moved for a stay in the prior action in the district court pending receipt of the right-to-sue letter that resulted from the timely filing of his first administrative complaint. See Woods v. Dunlop Tire Corp., 972 F.2d 36, 41 (2d Cir. 1992). In the alternative, Criales could have requested the district court to

dismiss the prior action without prejudice to renewal upon receipt of the timely right-to-sue letter. Although Criales has conducted the bulk of this litigation as a pro se litigant, he did appear by counsel at various stages of the first action. Whether the fault is that of counsel or Criales himself, the failure to have considered these alternatives leaves Criales in his present bind.

Because the district court properly dismissed Criales' federal claims, it did not abuse its discretion in declining to exercise jurisdiction over his state law claims. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988). Criales may bring his state claims in state court if he chooses to do so.

APPÉNDIX "A"

NITED STATES COURT OF APPEA[illegible]
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

EDNY
95-cv-1709
Glasser, DJ

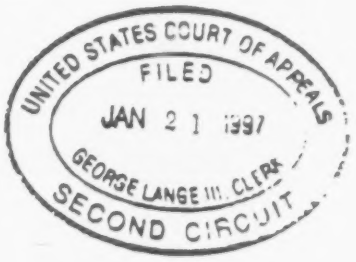
MANDATE

GEORGE LANGE III
CLERK

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of January, one thousand nine hundred and ninety-seven.

PRESENT: HON. Roger J. Miner
HON. Joseph M. McLaughlin
HON. Pierre N. Leval

Circuit Judges



Docket No: 95-9170

MAURICIO CRIALES,

Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC.,

Defendant-Appellee.

Appeal from United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the judgment of said district court be and it hereby is affirmed in part, vacated in part, and remanded to the said district court for further proceedings in accordance with the opinion of this court.

For the Court
GEORGE LANGE III, Clerk
By: [signature]
Beth J. Meador
Administrative Attorney

ISSUED AS MANDATE. 5-13-97

T 1080
2/93

United States Court of Appeals
FOR THE SECOND CIRCUIT

ORIGINAL

PAGE 1

Each motion must be accompanied by a supporting affidavit (Local Rule 27(a)).

MAURICIO CRIALES,
Plaintiff-Appellant,

- against -

AMERICAN AIRLINES, INC.,
Defendant-Appellee.

Use short title

95-9170
Docket Number

NOTICE OF MOTION

State type of motion

for Stay of Mandate

APR 30 1997

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*
Edward Cerasia II, Esq.
Seyfarth, Shaw, Fairweather & Geraldson
900 Third Avenue
New York, New York 10022-4728

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*
Mauricio Criales, Pro Se
37-57 61st Street
Woodside, New York 11377

Has consent of opposing counsel:
A. been sought? ☐ Yes ☒ No
B. been obtained? ☐ Yes ☒ No
Has service been effected? ☒ Yes ☐ No
Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)
Requested return date:
(See Second Circuit Rule 27(b))
Has argument date of appeal been set:
A. by scheduling order? ☒ Yes ☐ No
B. by firm date of argument notice? ☒ Yes ☐ No
C. If Yes, enter date: April 19, 1996
Judge or agency whose order is being appealed:
I. Leo Glasser

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)
Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No
If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Brief statement of the relief requested:
Pursuant to Fed. R. App. P. 41(b), defendant-appellee American Airlines, Inc. seeks a 90-day stay of the issuance of mandate pending petition for writ of certiorari to the United States Supreme Court.

Complete Page 2 of this Form

By: *(Signature of attorney)* Edward Cerasia II
Signed name must be printed beneath
Edward Cerasia II

Appearing for: *(Name of party)* American Airlines, Inc.
Date
April 30, 1997

Appellant or Petitioner: ☐ Plaintiff ☐ Defendant
Appellee or Respondent: ☐ Plaintiff ☒ Defendant

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is [redacted] denied.

(Judge Miner dissents.)

MAY 12

Joseph M. McLaughlin

Jacobs

62

BNA's

EMPLOYMENT DISCRIMINATION REPORT

RECEIVED
FEB 19 1997

Vol. 8, No. 7 The Bureau of National Affairs, Inc. February 12, 1997

PROPOSED CLASS ACTION RULE REVISIONS, including controversial proposal that would allow federal courts to certify classes in cases in which tentative settlements have already been reached, are approved by American Bar Association policy-making body. In consensus vote, ABA House of Delegates also endorses due process standards for mediation and arbitration of statutory employment disputes. (Page 213)

EMPLOYEE/INDEPENDENT CONTRACTOR STATUS is element in Age Discrimination in Employment Act case that must be proven by plaintiff and decided by jury, Eleventh Circuit rules. (Page 197)

NO DAMAGES FOR SEX HARASSMENT ARE AVAILABLE for conduct that predates November 1991 effective date of Civil Rights Act of 1991, Eighth Circuit holds, as it vacates jury awards for two female former workers at steel plant and orders new trial. (Page 198)

FIRM'S LIST OF 18 WORKERS' NAMES WITH AGES who might be retained in event of layoffs did not create liability under ADEA, even though most younger workers on list ultimately kept their jobs while most of older people did not, Seventh Circuit rules. (Page 198)

CONSTRUCTION FIRM THAT WAS LOW-BIDDER on two public sewer projects in New York but was denied contracts awarded to minority business enterprises can sue city under federal civil rights law even though sewer projects were nearly completed when suit was filed, Second Circuit rules. (Page 199)

MANDATORY EEO TRAINING FOR EMPLOYEES is part of plan agreed to by Massachusetts Bay Transportation Authority and 25 unions in effort to address workplace discrimination that was being investigated by state attorney general. New EEO plan preempts union contracts in most cases. (Page 203)

MORBIDLY OBESE PRODUCTION MANAGER for New York-based trade publication fails to convince federal judge that her condition warrants protection under Americans with Disabilities Act, but court allows her claim to proceed under more broadly worded state human rights law. (Page 201)

HISPANIC AIRLINE MECHANIC, whose first national origin discrimination suit was dismissed because it was based on untimely administrative charge, is not barred from bringing second suit based on prior, timely charge, divided Second Circuit rules. (Page 209)

ANALYSIS & PERSPECTIVE

Taxation: Because rules regarding tax treatment of employment recoveries have changed radically over short period of time, confusion exists about which rules apply depending on when recovery was received. San Francisco tax attorney Robert Wood illustrates how date of settlement or payment can be critical and provides flowchart for determining whether recovery may or may not be excludable from income taxes. (Page 215)

ALSO IN THE NEWS

EEOC: Clinton administration's fiscal 1998 budget request of $246 million for Equal Employment Opportunity Commission would keep agency operating at about same current spending level. (Page 194)

Sex Harassment: California jury convicts woman of falsifying electronic-mail message in order to get $100,000 settlement in case involving Oracle Corp.'s chief executive officer. (Page 208)

Affirmative Action: Shoney's Inc. may omit from its 1997 proxy materials shareholder proposal seeking report on company's affirmative action policies and programs because it deals with company's ordinary business, Securities and Exchange Commission advises. (Page 196)

Sex Harassment: Two cases raising issue of employer's liability for alleged sex harassment by supervisor when harassed employee failed to lodge formal complaint will be reheard en banc by Seventh Circuit. In one case, court vacates panel opinion that employer may be held liable under 1964 Civil Rights Act despite lack of notice. (Page 212)

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the grievance/arbitration procedure was "permissive" rather than mandatory.

Judge Doumar ordered the dispute to be sent to arbitration. He relied on the Fourth Circuit's 1996 opinion in *Austin v. Owens-Brockway Glass Container Inc.* (6 EDR 364, 386, 3/20/96; 70 FEP Cases 272), which was recently left standing by the U.S. Supreme Court (7 EDR 607, 11/13/96).

The appeals court in *Austin* dismissed an ADA claim on the grounds that it must go to arbitration under a collective bargaining agreement. In Bright's case, Doumar similarly rejected the argument that the arbitration procedure is permissive rather than mandatory. Contract language that the union "may" submit a case to arbitration "is to give an aggrieved party the choice between arbitration and abandonment of his claim," not a choice between arbitration and litigation, the court said.

With access to the courts "neither affordable nor expeditious, we should view arbitration not with suspicion but with relief," Doumar added. "Arbitration and other alternative methods of dispute resolution provide for ordinary citizens and businesses what our court system no longer produces with any regularity: affordable, speedy justice."

Agreement Does Not Cover Title VII

In a separate opinion, however, Doumar rejected Alamo Rent-A-Car's argument that a former employee who resigned because of alleged sex harassment must submit to arbitration.

The nonunion company requires workers to sign a "Personal Alamo Family Member Pact," or "Fampact." The document, prepared by Alamo but written in the voice of the employee, includes an arbitration clause that states: "If I claim that Alamo has violated this FamPact, I agree that the dispute will be submitted to and resolved through binding arbitration . . . ."

The company argued that the contract required parties to submit all employment disputes to arbitration but plaintiff Percilla Rudolph contended that the clause only referred to breaches of "Fampact" and not to violations of statutory law.

Although "Fampact" stated that employees were guaranteed "the right to be free from harassment" and "the right to be free from discrimination," the court noted that there was no further mention of statutory rights under Title VII of the 1964 Civil Rights Act or other federal laws.

"[T]he presumption in favor of arbitration is not a mindless mantra repeated merely for the sake of consistency," Doumar wrote, and in this case, the terms of Fampact did not apply to Rudolph's statutory claims.

"[B]ecause Fampact neither required arbitration of any employment disputes nor specifically bound Alamo to comply with Title VII and other statutes, the court simply cannot overcome the elementary and ultimate observation: nowhere does Fampact memorialize an agreement to arbitrate the statutory claims that Rudolph asserts before this court," he wrote.

National Origin Discrimination

COURT HOLDS DISMISSAL OF FIRST CASE NO BAR TO SUIT BASED ON TIMELY CHARGE

A Hispanic airline mechanic, whose first national origin discrimination suit was dismissed because it was based on an untimely administrative charge, is not barred from bringing a second suit based on a prior, timely charge, a divided U.S. Court of Appeals for the Second Circuit has ruled (*Criales v. American Airlines Inc.*, CA 2, No. 95-9170, 1/27/97).

In a case with "a rather complex procedural history," the court said that plaintiff Mauricio Criales' first suit against American Airlines Inc. was "premature" and should not be given preclusive effect. The appeals court reversed a lower court's dismissal of Criales' claims under Title VII of the 1964 Civil Rights Act.

Writing for the majority, Judge Pierre N. Leval said that because Criales "remained capable of complying with [the statutory prerequisites] by instituting suit after receipt of the right-to-sue notice on the timely charge, the dismissal of the first complaint should not have been found to operate as an adjudication upon the merits and as a bar to the subsequent complaint filed after the precondition had been satisfied."

Two Charges Followed Separate Paths

Criales is a native of Colombia and U.S. citizen who worked for American as a mechanic at John F. Kennedy International Airport. He alleged that his co-workers harassed and ridiculed him because of his Latino origin and that the airline condoned the conduct.

In December 1991, American suspended Criales pending investigation of a charge that he filed a false expense report for an out-of-town training course. He was fired two weeks later and filed a union grievance, but an arbitration panel upheld the dismissal.

Criales filed his first discrimination charge with the Equal Employment Opportunity Commission in February 1992 within the time allowed by Title VII, and it was transferred for processing to the New York State Division of Human Rights. Because he did not hear that anything was happening with the first charge, he filed a second charge in December 1992, this time with the New York City Commission on Human Rights. The second charge was transferred to EEOC, which dismissed it as untimely and issued a right-to-sue notice in October 1993.

In November 1993, Criales filed suit pro se under Title VII and, after retaining an attorney, added claims under the Civil Rights Act of 1866 (42 USC 1981) and state common law. Meanwhile, in August 1994, NYSDHR dismissed his first charge on the ground that the same issues were being litigated in court.

In November 1994, the U.S. District Court for the Eastern District of New York dismissed the Title VII claim because the underlying administrative charge was untimely. During the pendency of Criales' pro se appeal, he received a right-to-sue letter on the first, timely charge and attempted to withdraw his appeal without prejudice and go back to the district court.

The Second Circuit denied the motion but allowed him to withdraw the appeal with prejudice.

After again obtaining counsel, Criales filed a second suit based on his original, timely charge. The district court granted American's motion to dismiss the Title VII claims as barred by res judicata, and Criales appealed a second time.

First Suit Was 'Premature'

Rule 41(b) of the Federal Rules of Civil Procedure provides that a dismissal is with prejudice unless a court specifies otherwise, but an exception exists for dismissals due to "lack of jurisdiction." The district court found that the first dismissal did not fall within the Rule 41(b) exception because Title VII time limits are subject to equitable tolling and are therefore not jurisdictional.

The district court's only reason for dismissal of the first suit was the untimeliness of the charge but the problem "is more appropriately seen as one of prematurity," Leval wrote. Criales' "problem was that he filed the initial complaint without waiting for the issuance of the right-to-sue notice based on his timely charge."

Failure to exhaust administrative remedies is no bar to a later suit once the administrative process has been completed, Leval said. "There is no reason why the result should be different here merely because [Criales] had filed a second administrative charge that was superfluous and untimely," he found.

In *Costello v. U.S.*, 81 S.Ct. 534 (1961), the U.S. Supreme Court found that "lack of jurisdiction" was a term of art that encompassed failure to comply with statutory prerequisites, according to Leval. Rule 41(b)'s exception was based on the common law rule that "dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim," Leval found.

The Second Circuit decided in several cases following *Costello* that Rule 41(b)'s preclusive effect applied only to cases dismissed after the defendant incurred the inconvenience of preparing to meet the merits of the claims, Leval said.

Criales' filing of a complaint based on an untimely charge and his failure to wait for a right-to-sue notice on his timely charge simply constituted nonfulfillment of a prerequisite to determination of the merits of his claims, Leval reasoned. Since American was not put to the necessity of preparing a defense, the court said, it was a dismissal for lack of jurisdiction within the meaning of Rule 41(b).

The appeals court also revived Criales' pendent state law claims, which were dismissed for lack of subject-matter jurisdiction after the federal claims were dismissed. Judge Joseph M. McLaughlin joined in the majority opinion.

Dissenting in part, Judge Roger J. Miner argued res judicata was appropriate because filing a timely charge is not a jurisdictional prerequisite. He noted that Criales could have moved for a stay or dismissal without prejudice pending receipt of the right-to-sue letter for the timely charge and could still bring his state law claims in state court.

Criales was not represented by an attorney on appeal.

Edward Cerasia of Seyfarth, Shaw, Fairweather & Geraldson in New York represented American.

Federal Procedure

CA 8 FINDS MAGISTRATE LACKED JURISDICTION TO CONDUCT TRIAL WITHOUT PARTIES' CONSENT

A federal magistrate judge lacked jurisdiction to conduct a jury trial on age and sex discrimination claims when the parties did not consent to the referral, the U.S. Court of Appeals for the Eighth Circuit has ruled (*Reiter v. Honeywell Inc.*, CA 8, Nos. 95-2859 and 95-2884, 1/16/97).

A judge in the U.S. District Court for the District of Minnesota referred plaintiff George Reiter's discrimination and tort claims against Honeywell Inc. to a magistrate judge. The parties neither consented nor objected before a jury trial was conducted, which resulted in a verdict for the plaintiff. The judge adopted the magistrate's recommendations, which rejected some of the jury's findings and reduced the verdict from $765,000 to $261,281. Both sides appealed.

Although the district judge cited 28 USC 636(b)(2) and Rule 53(b) of the Federal Rules of Civil Procedure as authority for the referral, the Eighth Circuit said that the requirements for neither rule were satisfied since the parties did not consent and the judge did not make the requisite findings. Without reaching the merits of the case, the appeals court dismissed the appeal for lack of jurisdiction and remanded the case to the district court.

Writing for the appeals court, Judge C. Arlen Beam commented that the court's holding "is in no way meant to condone defendants' actions." He noted that the defendants "only complained of the referral after the jury rendered a hefty verdict against them." "This 'wait and see' procedure is contrary to judicial efficiency," he wrote.

Consent Not Sought For Referral

After more than 35 years with Honeywell, Reiter retired at age 56 as a senior lead coordinator of production control but later claimed that he was constructively discharged because of his age and gender. He sued Honeywell and several individual defendants under Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, and the Minnesota Human Rights Act.

After granting the defendants summary judgment on several contract and tort claims, the district court judge referred the remaining matters to a magistrate judge "as special master, for trial and recommended findings of fact and conclusions of law." The only reason given was that the case had been on the docket for more than one year. Reiter made a jury demand, but he was not entitled to a jury trial on all his claims.

A jury found for Reiter on all claims and awarded $315,000 in damages for age and sex discrimination, $300,000 in damages from defamation, and $150,000 for emotional distress.

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APPENDIX " B "

September 13, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

MAURICIO CRIALES,

Plaintiff,

-against-

AMERICAN AIRLINES,

Defendant.

95-CV-1709 (ILG)

----------X

INTRODUCTION

Mauricio Criales ("Criales"), the Plaintiff herein, submits this memorandum of law in response and opposition to defendant American Airlines, Inc.'s ("American") motion to dismiss the First and Second Causes of Action (Title VII of the Civil Rights Act, as amended, and 42 U.S.C. Section 1981) in the complaint on principles of res judicata, and the Third and Fourth Causes of Action (defamation and intentional infliction of emotional distress) derivatively, through a lack of supplemental jurisdiction over these state law claims. American alternatively seeks dismissal pursuant to Fed. R. Civ. P. 12(b)(1) or (6), or dismissal of post-November 21, 1991 harassment claims pursuant to Fed. R. Civ. P. 56. For the reasons enunciated below, Criales opposes dismissal in entirety, and seeks to move this matter forward so that it may finally be heard on its merits.

PRELIMINARY STATEMENT

Criales worked for American for over a year as a commercial

airplane mechanic before he was pretextually fired for expense report improprieties which totalled at most $120.00. Known to the company was the fact that other white, non-Hispanic employees of the defendant engaged in misconduct that damaged aircraft, jeopardized the safety of American's passengers, and compromised the very integrity of the company to its shareholders. After the defendants employees' one year reign of discriminatory terror failed to force Criales to quit his job at American, he was actively induced into filing inaccurate expense reports by the company's employees. The company subsequently singled Criales out, and after it's investigation terminated him for dishonesty in filling out his expense reports, which in the aggregate were still $221.00 less than the total American had afforded him.

After his discharge, and an arbitration hearing conducted without counsel, Criales immediately filed **one** charge of discrimination based upon national origin against the defendant with the United States Equal Employment Opportunity Commission ("EEOC). This charge was filed on February 5, 1992, 45 days after Criales' December 21, 1991 termination, and challenged Criales' termination after countless episodes of harassment by the defendant's employees and managers (EEOC Charge No. 160-92-1069). This charge was later referred to the New York State Division of Human Rights ("NYSDHR") for initial processing.

Yet, somehow, this timely filed charge had not been responded to by December 3, 1992, approximately 250 days after Criales had filed it pro se. After Criales' attempts to obtain

any information as to the status of his initial EEOC complaint had failed, Criales went pro se to the New York City Commission on Human Rights ("NYCCHR") and filed a second complaint. The second complaint was then referred to the EEOC (Charge No. 160-93-0816). This complaint then became the only complaint which the EEOC had received from a New York agency for action thus far. Accordingly, although this second complaint to the NYCCHR was dismissed by the EEOC as untimely, and the initial complaint referred to the NYSDHR by the EEOC was actually timely, a right to sue notice was issued by the EEOC on the second complaint (Charge No. 160-93-0816). The first complaint was ultimately dismissed, as Criales had already sought judicial relief in this Court.

After obtaining what he believed to be a valid Right-to-Sue notice from the EEOC, and still pro se, Criales filed a complaint in this Court, Criales v. American Airlines, Inc., 93-CV-5340 (ILG), ("Criales I") alleging Title VII violations. At the commencement of Criales I, Criales did not have a right to sue letter based upon his timely filed February 5, 1992 charge. The defendant argues that Mr. Criales pro se should have realized that he could have requested a right-to-sue letter under 42 U.S.C. 2000e-5(f)(1).

After the filing of his initial Complaint, Criales sought and obtained counsel, and on July 29, 1994 an Amended Complaint was filed. The Amended Complaint alleged Title VII and 42 U.S.C. 1981 violations, based on Criales' Colombian national origin, and

state law claims of defamation and intentional infliction of emotional distress ("IIED").

Shortly thereafter, on September 1, 1994, the defendant moved pursuant to Fed. R. Civ. P. 12(b)(6) for dismissal of Criales' entire complaint. On November 14, 1994, in a written memorandum, this Court dismissed Criales' Title VII claims as untimely, his Section 1981 claims as not encompassing national origin, and his state law claims for lack of jurisdiction in light of dismissal of all federal causes of action. On November 21, 1994 judgement was entered in the District Court.

On December 1, 1994 Criales filed a pro se Notice of Appeal. Criales and the defendant submitted their briefs, and prepared for argument. On January 31, 1995, during the pendency of Criales' appeal, Criales personally returned to the EEOC and finally managed to obtain a right to sue letter on his timely filed, February 5, 1992 complaint. This right-to-sue letter was appended to Criales' brief. In response to Criales' presenting this right-to-sue letter to the Second Circuit, the defendant moved to strike materials not contained in the lower court record.

On April 25, 1995 Criales moved to withdraw his appeal without prejudice, as he had already instituted a second suit through counsel in district court. On May 3, 1995 the defendant responded to Criales, seeking dismissal with prejudice and costs to the defendant. The Second Circuit denied American's request for costs, but allowed Criales to withdraw his appeal with

prejudice. Criales, acting pro se, withdrew his appeal, and American's motion to strike materials not in the lower court record was denied as moot, thereby terminating all outstanding aspects of Criales' appeal.

On April 28, 1995, Criales instituted the instant case, Criales II, based on the January 31, 1995 right-to-sue notice and his February 5, 1991 EEOC charge (Compl.,Ex. A). Criales II alleges conduct similar to that alleged in Criales I, principally violations of Title VII and 42 U.S.C. 1981, and supplemental state law claims for defamation and IIED. Several key distinctions may be drawn between Criales I and Criales II, however.

First, each proceeding was predicated on a right to sue letter from a different charge. Criales I was instituted with an untimely right-to-sue notice based on Criales' December 3, 1992 complaint to the NYCCHR, whereas Criales II was instituted on a timely right-to-sue letter stemming from Criales' initial complaint to the EEOC on February 5, 1992. Secondly, Criales I alleged national origin as the basis for recovery under Section 1981, whereas Criales II contains the significantly different allegation of racial discrimination as a basis for recovery under Section 1981. Third, Criales II alleges specific incidents of disparate impact of the defendant's employee regulations, whereas Criales I does not.

The defendant, pursuant to Fed. R. Civ. P. Rule 8(c), has raised the affirmative defense of res judicata as to Criales II,

arguing that Criales II meets its three prerequisites for dismissal: first, American notes that the parties to both actions are identical -- which fact is not in dispute; second, the defendant argues that Criales I was adjudicated on its merits. Criales, on the other hand, argues that Criales I was dismissed as to its Title VII allegations for failure to meet the condition precedent of obtaining a valid right-to-sue letter before commencing suit in federal court. Not one of the substantive issues raised by Criales was ever "adjudicated on its merits." Third, the defendant urges that both the Title VII and Section 1981 actions in Criales II are based on identical causes of action as those in Criales I. The defendant argues that, as Criales failed to assert the present Title VII and 1981 claims in Criales I, that he is forever barred from litigating the merits of these claims in Criales II.[1] American is thus seeking to use the doctrine of res judicata, a rule of judicial economy, to avoid its having to defend itself on the merits as to the substantive issues raised by Criales II.

The defendant also proffers an additional seven alternative bases for dismissing Criales II (Defendant's Motion to Dismiss, pp. 5-6). Each point raised by the defendant is meritless with respect to Criales II, and will be examined in turn after the

---

[1] Criales concedes that, if this Court should dismiss the federal causes of action against the defendant, that it has no supplemental jurisdictional basis for proceeding on the state law claims which Criales raises in his Third and Fourth Causes of Action. Dunton v. County of Suffolk, 729 F.2d 903, 910-911 (2d Cir. 1984).

backdrop against which these allegations are to be viewed has been set.

BACKGROUND

A. The Parties

Criales is an American Citizen, Hispanic in descent and of Colombian national origin (Compl., para. 5). Criales worked for the defendant American as a union-represented aircraft mechanic from November 10, 1990 to December 20, 1991 at John F. Kennedy International Airport ("JFK"), in Jamaica, New York (Id., para. 6). After a year of enduring a racially discriminatory hostile work environment, Criales was fired pretextually for $120.00 in expense account improprieties (Id., para. 48-51).

The defendant American is an air carrier, pursuant to the Railway Labor Act, 45 U.S.C. Section 151 et seq. American operates a portion of its airline business at JFK (Compl., para. 4).

B. The Criales II Complaint

The First Cause of Action raised by Criales is that of employment discrimination by the defendant American due to Criales' Hispanic, or Latin, ancestry or race (Compl., paras. 1, 7, 11, 12, 15, 19, 24, 32, 61). The Second Cause of Action devolves around Criales' wrongful discharge by the defendant, and the disparate impact of its employee regulations upon him. Criales was discriminated against, and wrongfully terminated by

the defendant due to his race (Compl., paras. 38-69).[2]

Criales also asks the Court to exercise supplemental jurisdiction over his Third and Fourth Causes of Action, the state law claims of defamation based upon libel and slander per se, (Compl., paras. 71-79), and IIED (Compl., paras. 81-83).

1. The Workplace Harassment In the First Cause of Action

From the second day of his employment, up until the last mocking comment on the public address system on December 20, 1991 when Criales cleaned his personal effects out of his locker and was terminated formally, Criales was pervasively, severely, and degradingly harassed due to his Hispanic race.[3] (Compl., paras. 7-29).

a. The pre-November 21, 1991 conduct

Admitted, Criales was only employed at defendant American for one month after November 21, 1991, thirteen days of which were spent on paid suspension pending final investigation of his expense account improprieties. The pre-November 21, 1991 conduct was constant, demeaning, and designed to drive Criales either crazy or out of the defendant's employ (Compl., paras. 11-34).

---

[2] Obviously, Causes of Action One and Two implicate the Civil Rights Act of 1991 ("CRA of 1991"), 42 U.S.C. 1981 and all subsections of the statute.

[3] Hispanic, Latin, and Race are all terms which are used interchangeably throughout this memorandum, and which are not mere "national origin."

It included the writing of epithets, public address pranks, amplified insults, and personal confrontations. (Id.).

b. **The post-November 21, 1991 conduct**

Criales raises four specific allegations of post-November 21, 1991 abusive, discriminatory conduct. (Compl., paras. 16, 33, 34, 35). In an effort to render these allegations de minimis, the defendant points to Criales' deposition testimony, which was given while he was pro se, without counsel, and under the complete control of the defendant's attorneys, in which he stated that after September he had been subjected to no more incidents of harassment. Clearly, Criales' deposition testimony is of little value under the one-sided circumstances in which it was taken. Criales was easily duped into confusion by American, and he often did not understand the questions posed to him. Should Criales be afforded the opportunity to put on his case, testimony will substantiate his allegations of a continuing course of discriminatory conduct up until December 20, 1991[4] through the

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[4] The defendant attempts to question the integrity of counsel in drafting the complaint in Criales II, with the rhetorical question: "one wonders how paragraphs 16 and 33 of the Complaint can allege that Criales was harassed at work up to 'December 20, 1991', when Criales' last day of work at American was December 7, 1991." (Defendant's Motion to Dismiss, page 10, fn. 6). This bit of factual omission on the part of the defendant is indicative of its trend in minimizing or ignoring Criales' allegations: what is earth shattering to Criales is "minuscule" to American. The fact remains that, when Criales was formally terminated by American on December 20, 1991, he returned to retrieve his possessions from American's JFK location, and he was publicly mocked again on the public address system by the same person whom management already knew had been terrorizing him.

testimony of the defendant's own employees.

2. **Discriminatory Discharge in the Second Cause of Action**

The Second Cause of Action stems from the circumstances of Criales' dismissal by the defendant. From September 20, 1991 to October 18, 1991, Criales, as well as two other American mechanics who worked with Criales, attended a special avionics training course at O'Hare International Airport in Chicago, Illinois. (Id., para. 44) Criales was given a $1,000.00 spending allowance for the entire month. Of this $1,000.00, Criales spent only $729.00 (Id., para. 46), yet somehow he was singled out for investigation into his dry cleaning expenditures.

Criales had received oral instructions on the filling out of his expense reports. He still, however, did include in his itemized expenditures dry cleaning charges which he falsely claimed to have incurred in Chicago, when the charges were actually incurred in New York. (Id., para. 48). Criales included these expenses because he had never filled out expense reports before, and he was told that he could safely itemize dry cleaning expenditures by the two employees of American who had accompanied him to Chicago.

Upon Criales' return, despite having spent only 73% of the money allotted to him by American for an entire month, Criales was singled out and investigated for expense account violations. (Id., para. 49.) Criales was temporarily suspended by the defendant on December 7, 1991, pending the outcome of its

investigation. Two weeks later, Criales was terminated in his employment, American having held that he violated company rules 16 and 34 (Id. para. 51.) After Criales' union contested his termination at Arbitration, on March 12, 1992, Criales was found terminated for just cause pursuant to his employment contract. Criales was not represented by counsel at this proceeding, but a union representative did speak on his behalf, noting:

> The company has agreed to in the **letter of stipulation** and raised questions of harassment on the job, of being a foreigner in this country....being made a fool of on the PA system, having his mother's name slandered, things written on walls, hiss time card punched in and out; what he perceives as a set up...(emphasis added)

(Ex. 2, Discharge Hearing, dated March 12, 1992, p. 219). Clearly, Criales' "story" was the same at his arbitration as it is now. He has always maintained that he was discriminated against, and that he had been set up for termination by the defendant and its employees.

3. State Law Claims in the Third and Fourth Causes of Action

In his Third Cause of Action, Criales states that he was defamed upon termination by the defendant's issuance of a "no-comment letter," which had the effect of preventing him from obtaining employment of any sort for over two years in an industry where he had previously never had difficulty obtaining a job. (Compl., para. 72).

In his Fourth Cause of Action, Criales alleges IIED, in that he was conspired against by the defendant, its employees and

managers, who engaged in a continuing course of extreme and malicious conduct, which degraded, humiliated, and scarred Mr. Criales.

C. Criales' February 5, 1992 EEOC Charge and his Right to Sue Letter Based on that Charge

Criales' initial, pro se February 5, 1992 charge (Charge No. 160-92-1069) with the EEOC alleged discrimination based on national origin. The EEOC referred this charge to the NYSDHR for initial processing, and at the time of Criales I, a right to sue letter based upon this timely filed charge had not yet been issued by the EEOC. Criales, still pro se, went forward in Criales I, predicated solely upon the EEOC's erroneous granting of an untimely right to sue letter on Criales' second, December 3, 1992 complaint to the NYCCHR.[5]

After this Court granted American's motion to dismiss in Criales I, on January 31, 1995, Criales obtained a right-to-sue letter on the February 5, 1992 timely complaint from the EEOC for use in his appeal. Criales, pro se in the Second Circuit, then was moved against by the defendant, who sought to strike the timely EEOC right-to-sue letter from the appellate record. Criales sought to withdraw without prejudice, American moved for prejudice and costs. The Second Circuit then allowed Criales to withdraw his appeal with prejudice, which he did. The present

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[5] On August 29, 1994, Criales' timely complaint of February 5, 1992 was dismissed by the NYSDHR, as he had already instituted suit in federal court in Criales I.

action is based upon the timely right-to-sue letter, which Criales as a matter of law was entitled to, and which was a clear by product of the timely filed February 5, 1992 charge known to both the defendant and the Court during the disposition of Criales I.

ARGUMENT

I.

CRIALES' TITLE VII AND 42 U.S.C. 1981 CLAIMS IN THE FIRST AND SECOND CAUSES OF ACTION ARE NOT PRECLUDED BY RES JUDICATA

A. Criales' Title VII claims in the First and Second Causes of Action are not Barred by Res Judicata

Criales I was commenced in November, 1993. The Title VII claims in Criales I were predicated solely on the untimely issued right-to-sue letter of October 26, 1993, which relate back to his untimely filed December 3, 1992 complaint with the NYCCHR. Although Criales attempted to obtain a valid right to sue notice during the pendency of Criales I, the EEOC failed to provide a timely right-to-sue notice before this Court's dismissal of that action. Although Criales II implicates similar issues under Title VII, Criales' previous inability to obtain a right-to-sue notice constituted nothing more that failure to meet a condition precedent to being heard upon the merits in Criales I. As this infirmity in Criales I barred Criales from reaching the merits of his case, the First and Second Causes of Action in Criales II may not be dismissed as res judicata, per Fed. R. Civ. P. 41(b).

Noting Woods v. Dunlop Tire Co., 972 F.2d 36 (2d Cir. 1992), cert. denied, 113 S.Ct. 977 (1993), and its rule that: "A judgement on the merits in one suit is res judicata in another where the parties and the subject matter are the same," Id. at 38-39, Criales maintains that Criales I was not adjudicated on its merits. Rather, Criales I was dismissed for failure to meet a statutory prerequisite (Memorandum and Order, p. 6). Arguing that the EEOC had actually failed in its obligation to give Criales a right-to-sue notice on his timely filed complaint, Criales alleged that his situation was ripe for equitable modification under Hladki v. Jeffrey's Consol Ltd., 652 F. Supp. 388, 392 (E.D.N.Y. 1987). The Court rejected this argument, holding the Criales was not entitled to any equitable modification of Title VII's statutory prerequisites regarding his failure to receive a right-to-sue notice. None of Criales' substantive issues were ever raised.

In it's motion to dismiss, counsel for the defendant American indicates that:

> It is well settled law that the filing of a charge with the EEOC is a **jurisdictional prerequisite** to a private civil action under Title VII...(emphasis added) (Id., p. 26)

See also, Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); Mc Donnell Douglass Corp. v. Green, 411 U.S. 792, 798 (1973) (a complainant's right to bring suit under the Civil Rights Act of 1964 is not confined to charges as to which the EEOC has made a reasonable-cause finding). Under Fed. R. Civ. P. Rule 41(b), a dismissal for lack of jurisdiction does not

constitute an adjudication on the merits:

> Unless the Court in its Order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, **other than a dismissal for lack of jurisdiction**...operates as an adjudication upon the merits (emphasis added).

Criales failed to satisfy what this Court characterized as a "statutory prerequisite" in Criales I. Given the unique facts surrounding this litigation, failure to meet a "statutory prerequisite" is arguably identical to failure to meet a jurisdictional prerequisite under Rule 41(b). There was no adjudication on the merits in Criales I whatsoever. The only issue ever addressed by the Court as to Criales' Title VII claims was whether an equitable basis for waiving the right-to-sue notice requirement was present. Criales' subsequent obtaining of a right-to-sue letter clearly contravenes this Court's earlier decision as to the merits of Criales' argument regarding his ability to maintain Criales I. Criales pro se then managed to dismiss his appeal with prejudice, still never having presented his timely right-to-sue letter as a basis for overturning this Court's earlier holding. Accordingly, given Criales I and II's unique procedural history, Criales should not be precluded on res judicata grounds from bringing all Title VII allegations contained in Criales II, such that they may be finally and fully adjudicated upon their merits.

B. Criales' Section 1981 Claims In the First and Second Causes of Action are not Barred by Res Judicata

Criales II further alleges 42 U.S.C. Section 1981 claims,

which are also not dismissable under the doctrine of res judicata.

As discussed at length above, the three prerequisites for application of res judicata to Criales II have not been met. Although the parties are identical, the factual occurrences surrounding Criales' allegations in Criales II are substantially different. Here, an entirely different set of issues is presented to the Court. Rather than alleging the specific, pointed, national origin discrimination of Criales I, Criales alleges conduct which, if proven, does not encompass national origin discrimination. This conduct is actionable under Section 1981, and rules of judicial economy such as res judicata must yield to Criales' right to present the merits of his case. Also, in light of Criales I's termination without adjudication on its merits, Criales should be allowed to go forward with his Section 1981 claims, in conjunction with the Title VII claims which he raises above.

II.

THIS COURT DOES NOT LACK JURISDICTION OVER CRIALES' TITLE VII "RACE" DISCRIMINATION CLAIMS IN THE FIRST AND SECOND CAUSES OF ACTION

It is not so-well settled a principle that a pro se filing of a complaint with the EEOC precludes a plaintiff from seeking judicial relief for claims outside of the "four corners" of the original EEOC complaint. In fact, within the Eastern District of New York, at least one judge has held against the defendant's

present counsel that:

> the scope of a complaint in a Title VII suit is not limited solely by the charge [contained in the EEOC complaint] but by the 'scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.'"

Kahn v. Pepsi Cola Bottling Group, 526 F. Supp. 1268 (E.D.N.Y. 1981), quoting Silver v. Mohasco Corp., 602 F.2d 1083, 1090 (2d Cir. 1979), rev'd on other grounds, 447 U.S. 807, 100 S. Ct. 2486 (1980). See also, Yates v. Philip Morris Co., 690 F. Supp. 180, 184 (S.D.N.Y. 1988) ("under the law of this circuit, courts should take a flexible approach in interpreting Title VII complaints so as to consider any claim of discrimination reasonable related to the allegations in the complaint filed with the EEOC"); Avagliano v. Sumitomo Shoji America, Inc., 614 F. Supp. 1397, 1402 (S.D.N.Y. 1985) ("the Second Circuit has embraced a flexible approach in interpreting Title VII complaints filed with the EEOC"). Therefore, to the extent that Criales' claims before this Court of employment discrimination, disparate impact, and harassment due to race could have been reasonable outgrowths of the EEOC's investigation of his admittedly limited pro se EEOC complaint based upon national origin, these claims must be maintained and adjudicated on their merits in the instant case.

III.

CRIALES' TITLE VII HARASSMENT CLAIMS IN THE FIRST CAUSE OF ACTION ARE JUSTICIABLE

Even in light of this Court's jurisdiction to hear Criales' Title VII harassment claim, the defendant argues that: (a) with

respect to American's pre-November 21, 1990 discriminatory misconduct, Criales is entitled to no relief, and; (b) that Criales' post-November 21, 1990 discriminatory harassment was so de minimis as to not be actionable.[6]

The defendant then proffers a bifurcated approach to dealing with pre-November 21, 1990 and post-November 21, 1990 conduct.[7] American proposes that all of the discriminatory conduct which Criales experienced pre-November 21, 1990 should be excluded from any analysis as to the extent of Criales' discriminatory treatment post-November 21, 1990, and that the post-November 21, 1990 conduct must be viewed separately, in a vacuum.

The defendant's argument in adopting this strict bifurcation approach is that: (1) pre-November 21, 1991 conduct is not properly to be taken into account in meting out compensatory or punitive damages for post-November 21, 1991 damages under the Civil Rights Act ("CRA") of 1991, and (2) if Criales was not subject to "sufficiently severe or pervasive"[8] discrimination

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[6] The defendant also cites Criales' deposition testimony as a pro se plaintiff, without counsel, that he was not discriminated against post-November 21, 1990 as a basis for dismissal. However, as earlier noted, Criales' deposition under such one-sided and uneven circumstances has little evidentiary value. A reading of the entire transcript is enlightening as, when viewed in totality, it clearly demonstrates that Criales was manipulated extensively during his questioning by American.

[7] November 21, 1990 is a critical line of demarcation, in that it is the date that the damages provisions of the Civil Rights Act of 1991 took effect, entitling a plaintiff to, inter alia, compensatory and punitive damages. Prior to this time, equitable remedies alone were available to plaintiffs.

[8] See Harris v. Forklift Systems, Inc., 114 S.Ct. 367, 370 (1994). To satisfy the "pervasive" requirement under Harris, the

post-November 21, 1990, then none of the conduct he alleges post-November 21, 1990 is actionable.

Criales is not attempting to bootstrap pre-November 21, 1991 conduct to that which occurred later, in an attempt to recover punitive and compensatory damages for this earlier conduct per the CRA of 1991. Criales concedes that his pre-November 21, 1991 discrimination allegations, if successful, warrant only equitable relief -- principally in the form of back pay and associated lost benefits.

Criales does argue, however, that the pre-CRA of 1991 conduct must be taken into account as to the state that this continued discrimination left Criales in on November 21, 1990. The post-CRA Criales may be analogized to a tort victim with an eggshell skull. It is a clearly settled principle that one "takes their victim as they find them," regardless of their feebleness at the time of the tort. Criales, after being put through a solid year of abusive discrimination by the defendant, entered into the post-CRA of 1991 period of his employment with American, short as it was, in a considerably more fragile state than he had when he commenced his employment with American in November, 1990.

"incidents must be more than episodic; they must be sufficiently continuous and concerted." Carrero v. New York City Housing Auth., 890 F.2d 569, 581 (2d Cir. 1989). In this respect, the pre-CRA of 1991 conduct is directly relevant to proof of concerted, continued conduct. Even though these pre-CRA of 1991 events may not warrant compensatory or punitive damages, they clearly have evidentiary value in substantiating the pervasiveness of Criales' post-CRA of 1991 claims.

Therefore, what American callously characterized as four non-pervasive acts of post-CRA discrimination by American and its employees, actually carried the weight of the world with them. It was these ultimate acts by the defendant which culminated a year's worth of psychological abuse. As such, without any attempt to retroactively apply the CRA of 1991, Criales' treatment during the two weeks that he was actively on the job site at American, and the two weeks thereafter that he was on temporary suspension, constituted among the greatest harms which he suffered. We concede that damages for the pre-CRA of 1991 conduct is limited to equitable relief. However, bifurcation and viewing in a vacuum is not consistent with "taking your victim as you find them" and would only undercut the true impact which the four alleged post-CRA acts had on Criales. Accordingly, Criales maintains his demand for punitive and compensatory damages for the post-November 21, 1991 conduct of the defendant.

IV.

CRIALES' SECTION 1981 CLAIMS, TO THE EXTENT THAT THEY ARE OUTSIDE OF THE STATUE OF LIMITATIONS ARE STILL ACTIONABLE UNDER PRINCIPLES OF EQUITABLE TOLLING

The defendant argues that, even though Criales may overcome the res judicata doctrine in bringing Criales II's Section 1981 claims, that the three year statue of limitations applicable to these claims has passed and that therefore Criales must be barred from litigating these issues. Admittedly, over three years have passed since these claims accrued. However, statutes of limitation are: "subject to waiver, estoppel, and equitable

tolling." Zipes v. Trans-World Airlines, 455 U.S. 385, 398 (1982). Given Criales' continued attempts to bring this case to a trial on its merits, and its unique procedural history, we respectfully urge that sufficient grounds for equitable modification exist with regard to Criales' present Section 1981 claims, and that they therefore be subject to equitable tolling of the statute of limitations.

V.

CRIALES' STATE LAW CLAIMS MAY BE WITHIN THE PURVIEW OF THIS COURT'S SUPPLEMENTAL JURISDICTION

Should this Court maintain any aspect of Criales' First and Second, federal, Causes of Action, the Third and the Fourth state law based Causes of action are properly within this Court's supplemental jurisdiction. Criales concedes that, should defendant's motion be granted as to Causes of Action One and Two, there is no jurisdictional basis for the state law claims before this Court. Accordingly, maintenance of Criales' Third and Fourth Causes of Action is predicated entirely upon this Court's decision with respect to dismissal of its federal bases for jurisdiction.

VI.

CRIALES' STATE LAW CLAIMS, IF WITHIN THE COURT'S SUPPLEMENTAL JURISDICTION, ARE ALSO SUBJECT TO EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS

Statutes of limitation are subject to equitable modification when appropriate. Zipes v. Trans World Airlines, Inc., 455 U.S.

485. Should this Court allow Criales to reach the merits of his federal Causes of Action, in light of Criales' attempts to adjudicate his complaints since they accrued and the tortured procedural history of this litigation, we respectfully urge that equitable tolling of his state claims is proper. Given the short New York State one year statute of limitations applicable to intentional torts, and the longer-term nature of bringing Title VII actions, further reason to allow Criales to litigate all of his claims exists. To not equitably toll the statute of limitations regarding Criales' state law claims under the circumstances of this case would serve only to bar future litigants from seeking a streamlined remedy in federal court for wide ranging abuses that stemmed from the same, or related, factual occurrences, but which were not capable of adjudication in the federal forum until after the shorter state statute had run.

VII.

CRIALES' STATE LAW CAUSES OF ACTION BOTH STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED

A. THE DEFAMATION CLAIM

American urges that its no-comment letter was: (1) not alleged to be published to a third party, (2) protected under a qualified immunity, even if it was purposefully inaccurate, and (3) was an omission rather than a false or defamatory statement of fact (Motion to Dismiss, pp. 47-49.) Criales retorts that

this letter was: (1) clearly "published" to third parties, in that each employer whom he interviewed with would receive it in the course of investigating his credentials for employment; (2) that these employers understood the meaning of a "no-comment" letter, and also the importance of employers writing letters that say absolutely nothing as a means of avoiding defamation actions as Criales has raised herein; (3) that the purported silence of the letter indicates to prospective employees that an individual is unhireable due to, literally, unspeakable conduct at a previous place of employment, and (4) that American's qualified immunity is not unlimited, and is actionable when, as here, Criales has alleged from the onset that his employer's conduct has been effectuated with ill will and malicious intent. Clearly, Criales has proffered a sufficient basis to survive dismissal on the Third Cause of Action for defamation, and to move this matter forward to the discovery stage.

B. **THE IIED CLAIM**

The defendant argues that, even if Criales' IIED claim is not time-barred, that it is not sufficiently "extreme and outrageous" as a matter of law and thus should be dismissed (Motion to Dismiss, p. 49). In support of its argument, the defendant cites dismissal of IIED claims where (1) an employer allowed crude and sexually derisive statements to occur in the workplace, Shea v. Cornell Univ., 192 A.D.2d 857, 596 N.Y.S. 502,

504 (3d Dep't 1993), and (2) a plaintiff was subjected to the religious slurs of "Kike" and "Hebe", Leibowitz v. Bank Leumi Trust Co. of New York, 152 A.D.2d 169, 548 N.Y.S.2d 513, 521 (2d Dep't 1989).

Criales' IIED claim is far more pervasive than those present in either Shea or Liebowitz. The basis for his IIED claim is stronger than those relied on by the defendant, the conduct which Criales has sufferred was sufficiently pervasive and severe to have had a lasting impact on him up until today, and is regardless an issue properly preserved for the trier of fact. Proof of Criales' allegations should be presented at trial, after he has presented his witnesses and evidence, and then this motion may be re-instituted by the defendant.

For purposes of the Motion to Dismiss presently before the court, though, all allegations contained in the complaint must be viewed as true, and all reasonable inferences in favor of the plaintiff must be drawn. Ortiz, v. Cornetta, 867 F. 2d 146, 149 (2d Cir. 1989). Furthermore, a complaint must not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Under this standard for dismissal, Criales has clearly stated a claim for IIED, and therefore dismissal for failure to state a claim is improper.

CONCLUSION

For all of the foregoing reasons, this Court should deny the defendant's motion to dismiss in entirety, schedule this matter for discovery and trial on its merits, and grant unto the Plaintiff any such other and further relief which it may deem just and proper.

Dated: New York, New York
September 13, 1995

Respectfully submitted,

CANTON & JASPER, ESQS.

By_____
Joseph A Bondy (JB-6887)
276 Fifth Avenue
New York, New York 10001
(212) 629-6489

Attorneys for the plaintiff
Mauricio Criales

APPENDIX " C "

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

MAURICIO CRIALES,

Plaintiff,

-against-

AMERICAN AIRLINES, INC.
EDWARD CERASIA II, and
THOMAS MATTINA,

Defendants.

----------X

MEMORANDUM AND ORDER
97 CV 526

GLASSER, United States District Judge:

From November 1990 until December 1991, plaintiff Mauricio Criales worked for defendant American Airlines as a commercial aircraft maintenance technician. Complaint ¶ 6. On January 15 1997, Mr. Criales brought this action, pro se, in the New York State Supreme Court of Queens County alleging that defendants American Airlines, Edward Cerasia II and Thomas Mattina defamed him, intentionally inflicted emotional distress upon him, conspired to defraud him, subjected him to malicious prosecution, and violated his rights under the First and Fourteenth Amendments of the Constitution. On January 31 1997, defendants American Airlines and Edward Cerasia II filed a petition to remove this action to federal court pursuant to 28 U.S.C. § 1441. Mr. Criales now moves for a remand arguing that this Court lacks jurisdiction to hear this case. For the reasons that follow, Mr. Criales' motion is denied.

The statutory provisions relevant to this motion are 28 U.S.C. §§ 1331, 1367 and 1441. Section 1441 provides, in part:

(b) Any civil action of which the district courts have original jurisdiction founded on a

claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Section 1367 provides, in part:

(a) . . . in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

As is clear from the language of section 1441, an action may be removed to federal court if it might have been brought in federal court originally. Box Tree So., Ltd. v. Bitterman, 873 F. Supp. 833, 836 (S.D.N.Y. 1995); Calhoon v. Bonnabel, 560 F. Supp. 101, 104 (S.D.N.Y. 1982). Hence, a case raising a federal question may be removed from state to federal court. 28 U.S.C. § 1331; Box Tree So., Ltd., 873 F. Supp. at 837. Likewise, a case raising both federal question claims and state law claims may be removed from state to federal court if the claims are related to the same case or controversy and therefore subject to the federal court's supplemental jurisdiction. 18 U.S.C. § 1367; Costantini v. Guardian Life Ins. Co. of Am., 859 F. Supp. 89, 90 (S.D.N.Y. 1994).

To determine whether a case raises a federal question, the court examines the face of the complaint at the time the petition for removal was filed. Westmoreland Hospital Ass'n v. Blue Cross of Western Pennsylvania, 605 F.2d 119, 123 (10th Cir. 1979), cert. denied, 444 U.S. 1077

(1980). If the adjudication of any claim requires the application of the law of the Constitution, treaties or laws of the United States, the case raises a federal question. Box Tree So., Ltd., 873 F. Supp. at 837.

Accordingly, because the complaint in this case alleges Constitutional violations, complaint ¶¶ 46-50, this Court has jurisdiction over this action and the plaintiff's motion for remand is denied.

SO ORDERED.

Dated: February 24, 1997
Brooklyn, New York

I. Leo Glasser, U. S. D. J.

A copy of the foregoing Memorandum and Order was this day sent to:

Mr. Mauricio Criales
37-57 61 Street
Woodside, N.Y.
11377

Douglass B. Maynard
Joyce J. Sun
Seyfarth, Shaw, Fairweather
& Geraldson
900 Third Avenue
New York, N.Y.
10022-5728

APPENDIX " D "

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERKS OFFICE
U.S. DISTRICT COURT ED. N.Y.
★ MAR 26 97 ★
P.M. ____ ____
TIME A.M. ____ ____

MAURICIO CRIALES.

Plaintiff

.V.

AMERICAN AIRLINES INC.,EDWARD CERASIA II Esq.,THOMAS MATTINA, FRANK GRILLO, US CUSTOMS and RODNEY DAVIS,FBI Agent JFK Airport
Defendants.

CV 97 1460 (ILG-ASC)

COMPLAINT
PLAINTIFF DEMANDS TRIAL BY JURY

GLASSER, J.
CHREIN
MAR 26 1997

PRELIMINARY STATEMENTS

1. This is an action for damages caused by the Defendants Malicious prosecution based on Defamation, Intentional Infliction of Emotional Distress; Conspiracy to Defraud; Constitutional Violation of the First (1) and 14th Constitutional Ammendments Priviledges of the United States of America.

JURISDICTION AND VENUE

2. Jurisdiction and venue are explicitly conferred upon this Court by 28 U.S.C.A Section 1631 ;1404. ; 28 U.S.C.A. Sec.1332 Multiplicity of parties; 28 U.S.C.A. 1331 constitutional laws and treaties; "Federal question" Jurisdiction ,are made by,e.g.,28 U.S.C.A Sections 1337,1339 and 1343; 42 U.S.C.A. Sect 1983.; 28 U.S.C.A. Sections 1346-2674-2680; Becaused this Complaint was Removed by the defendants and approved by honorable I. Leo Glasser , on His MEMORANDUM AND ORDER Signed February 12,1997 to take full Jurisdiction of the entire complaint Removed out from the SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF QUEENS Index No.001072/97 on January 15,1997 to the UNITED STATES DISTRICT COURT E.D.N.Y. on January 31,1997. Respecfully Request that all the Jurisdictionals

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Index No. 001072/97
Date purchased

MAURICIO CRIALES

Plaintiff(s)

against

AMERICAN AIRLINES.,ED CERASIA II,Esq.SEYFARTH,SHAW, FAIRWEATHER,and GERALDSON.,Esqs.
THOMAS MATTINA US CUSTOMS JFK AIRPORT AREA DIRECTOR

Defendant(s)

Plaintiff(s) designate(s) QUEENS County as the place of trial.

The basis of the venue is based on the county in which the premises are situated.

Summons with Notice

Plaintiff(s) reside(s) at

County of

RECEIVED
JAN 15 1997
COUNTY CLERK
QUEENS COUNTY

To the above named Defendant(s)

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within (20) days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated. WOODSIDE,NEW YORK
January 15,1997

MAURICIO CRIALES
Attorney(s) for Plaintiff ,PRO SE

Defendant's address:
AMERICAN AIRLINES,La Guardia Airport
ED CERASIA II,Esq. 900Third Avenue New York,NY 10022
THOMAS MATTINA, JFK Airport US CUSTOMS Jamaica NY 11430

Office and Post Office Address
37-57 61Street
WOODSIDE, NEW YORK 11377
(917)419-1272

Notice: The nature of this action is
Based on Defamation on slander per se,Intentional infliction of Emotional distress, Conspiracy to defraud,MALICIOUS PROSECUTION, Constitutional Violation of the First (1), and 14th Constitutional Ammendments priviledges of the United States.

The relief sought is to show a conspiracy to defraud is in progress and none of the defendant,s can denie me the right to work on my profession of 15 years as a licensed and qualify Aircraft Maintenance Thecnician.
Punity Damages -LIABLE for trying to destroy my reputation and responsible for the suffering. Embarassment and Humiliation caused by AMERICAN AIRLINES.

Upon your failure to appear, judgment will be taken against you by default for the sum of $ 1' 997.000,00 with interest from January 1997 and the costs of this action.

State of New York, SUP. .E COURT

SUPREME COURT Court, County of QUEENS

Index No. 001072/97

MAURICIO CRIALES

RECEIVED

FEB 06 1997

COUNTY CLERK
QUEENS COUNTY

against

AMERICAN AIRLINES.,ED CERASIA II Esq,SEYFARTH SHAW,FAIRWETHER AND GERALDSON Esqs.
THOMAS MATTINA US CUSTOMS JFK AIRPORT AREA DIRECTOR

Defendant(s)

Affidavit of Personal Service

State of New York,
County of QUEENS } ss.:

TERESA QUISBERT and LUIS FERNANDO ARBOLEDA being duly sworn, deposes and says that deponent is not a party to the action or proceeding, is over 18 years of age and resides at 41-07 53 Street Woodside New York 11377

That on the 5th day of February 19 97 at all the defendants last known address

deponent served the annexed NOTICE OF MOTION, SUPPORTING AFFIDAVIT,RJI request in this action, on SUMMONS AND COMPLAINT. ON February 5,1997 a Names above corporation, the defendant therein named, by delivering a true copy thereof to personally, the Request for Oral Argument on February 26, 1997 of said corporation: deponent knew the said corporation so served to be the corporation mentioned and described as defendant therein and knew of the charges against them ,served January 15/ to be the February 26 at 9:30 A.M. thereof.

Sworn to before me, this

5 day of Feb 19 97

Luis Fernando Arboleda

Teresa Quisbert

Print name beneath signature

Teresa Quisbert

PATRICK LYNCH
Notary Public, State of New York
No. 01LY7035560
Qualified in Queens County
Commission Expires Oct. 31, 1998

APPENDIX "E"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

MAURICIO CRIALES,

1997 JUN -4 A 10:10

Plaintiff,

CLERK
U.S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK

-against-

95-CV-1709 (ILG)

AMERICAN AIRLINES, INC.

Defendant.

----------X

PLAINTIFF MAURICIO CRIALES
MEMORANDUM OF LAW IN FURTHER SUPPORT THE TITLE VII
RACIAL DISCRIMINATION LAWSUIT REAFFIRMED BY THE
COURT OF APPEALS for THE SECOND CIRCUIT ON
95-9170

THE ARBITRATION DECISION THAT I WAS SUBJECTED BY AMERICAN AIRLINES; INC ON MARCH 12, 1992 "MOST BE OVERTURN ON GROUNDS THAT WARRANTS A RACIAL DISCRIMINATION LAWSUIT IN DISTRICT COURT "

1. MARVIN HILL JR Alleged "neutral" arbitrator is far from neutral he is Chairman AMERICAN AIRLINES —TWU New York area board of adjustment.

2. Who FAILED to interpretate and applicate the collective bargaining agreement.

3. HE SAT to dispense his own brand of industrial Justice.

4. HE FAILED to provide plaintiff Criales with any opportunity to call to testify all Supervisors or Crew Chiefs Whom he had Complaint of harrasement and Discrimination.

5. The Arbitrator did not resolve the Grievance by considering the proper sources, the Contract and those circunstances out which came the "Common law of the shop"

6. Documents were requested since January 21, 1992 but BILL GARY Labor Relations Manager at la Guardia Airport "OBJECTED"

HIS EXACT WORDS WERE ¡Mr Criales I wont give you Anything..... You are a THIEF... You Stole from US AND hanged the telephone down.

7. The Distri. Court most Vacate the Arbitr. n award because of Unfair and Prejudicial Exclusion or Admission of Evidence. I request other Expense accounts Investigated. No ones Training Class Expense receipts were ever Investigated.

Criales was Clearly Single-Out

8. a Court will also vacate an arbitral award which requires conduct in Violation of State Law. In UAW .v. W.M.chase Co (E.D:Mich. 1966)

10. In Criales Court of Appeals for the Second Circuit 95-9170 all three judges in the Pannel Agreed that all State Claims entered on the District Court Complaint 95-CV-1709 are actionable and can be claim Giving the District Court Eastern District the Jurisdiction for State Claims, which are

1. Intentional Infliction of Emotional distress
2. Defamation and slander per se.

11. When the Arbitrators award and Words manifest an infedelity to this obligation Courts have no choice but to refuse enforcement of the award.

12. Courts had Vacated the arbitrator's award holding that once the arbitrator had found cause for discipline ,He had no authority to consider How Just was the discipline actually imposed by the Employer.

13. I Claimed the Discharge was Too Severe Punishment specially when I was Never Reprimand for any wrong doing before., Like so many other employees of American Airlines Who after having Violated American Airlines Rules of Conduct And Rules of Safety, They were giving the Chance to stay. and still today are American Airlines Employees who after been reprimand,Suspended or even Fired were taken back by Management....NO ONE HAD TO GO AS FAR AS COMPLAINING IN DISTRICT COURT AS I HAD NO CHOICE TO DO SO:.....

14.

JUDICIAL REVIEW OF ARBITRATION AWARDS

Section 5

"VIOLATION OF LAW OR PUBLIC POLICY"

The arbitrator who bases his decision not on the parties agreement but on extrinsic statutory policy exceeds his Powers and renders his award subject to Judicial attack.

SUPREME COURT.

Arbitration Awards

Marvin Hill JR

Section 5 of JUDICIAL REVIEW OF ARBITRATION AWARDS

"VIOLATION OF LAW OR PUBLIC POLICY"

The arbitrator who bases his decision not on the parties agreement but on extrinsic statutory policy exceeds his Powers and renders his award subject to Judicial attack.

Supreme Court.
United Steelworkers -v-
Enterprise wheel and car Corp.
(US 1960)

A Court will also vacate an arbitral award which requires conduct in violation of State Law. UAW -v- W. M. Chace Co
(E.D Mich. 1966)

Dated: Woodside, Queens New York
June 1 ,1997

Respectfully submitted,

MAURICIO CRIALES
37-57 61 Street
Woodside, New York
(917) 419-1272